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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 188

HOMAN MFG. CO., INC., AN ILLINOIS CORPORATION,
Petitioner,

vs.

HAROLD R. ALE, DISTRICT DIRECTOR OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT (AND APPENDICES).

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INDEX

	PAGE
Opinions below	2
Jurisdiction	6
Questions presented	6
Constitutional provision and statute involved	6
Statement of the Facts	7
The Complaint	8
Proceedings and original summary judgment	9
First decision of Court of Appeals	9
The attempt to try the case and final judgment	10
The second appeal	13
Reasons for allowance of the writ	14
Argument	19
Conclusion	31
Appendices	
A—Opinion of the Court of Appeals for the Seventh Circuit rendered February 17, 1959, 264 F. 2d 158	1
B—Findings, Conclusions and Decree of the District Court for the Northern District of Illinois, Eastern Division (Perry, J.), entered March 24, 1958	7
C—Opinion of the Court of Appeals for the Seventh Circuit rendered February 4, 1957, 242 F. 2d 645	20
D—Order of the District Court for the Northern District of Illinois, Eastern Division (Nordbye, J.) in U. S. v. Shotwell (April 15, 1959)	40

CITATIONS.

Cases.

Berger v. U. S., 295 U. S. 78 4
Flora v. U. S., 357 U. S. 63 (1958) 29, 30
Helvering v. Taylor, 293 U. S. 507 ..... 17, 25
Hill v. Wallace, 259 U. S. 44 ..... 20, 21
John M. Hirst & Co. v. Gentsch, 133 F. 2d 247 (C. A. 6, 1943) 30
Lambrecht v. Wilson, 290 Ill. 547, 549-50 28
Mason v. Commissioner, 210 F. 2d 388 (C. A. 5, 1954) 29
Mesarosh v. U. S., 352 U. S. 1 4
Midwest Haulers, Inc. v. Brady, 128 F. 2d 496 (C. A. 6, 1942) 21, 30
Miller v. Standard Nut Margarine Co., 284 U. S. 498 ..... 17, 19, 20, 21
Napur v. Illinois, No. 583 this term 4
National Foundry Co. of N. Y., Inc. v. Director of Internal Revenue, 229 F. 2d 149 (C. A. 2, 1956) 19, 21
Shelton v. Gill, 202 F. 2d 503 (C. A. 4, 1953) 19, 21, 30
Smith v. Flinn, 261 F. 2d 781 (C. A. 8, 1958) 19, 21
State Railroad Tax Cases, 92 U. S. 575 ..... 23, 25
Sunday Lake Iron Co. v. Wakefield, 186 Mich. 626, 153 N. W. 14, 16 28
United States v. Shotwell Manufacturing Co., et al., 355 U. S. 233 ..... 2, 4
United States v. Shotwell Manufacturing Co., et al., 225 F. 2d 394 7
Yoke v. Mazzello, 202 F. 2d 508 (C. A. 4, 1953) 19, 20, 21
Yoshimura v. Alsup, 167 F. 2d 104 (C. A. 9, 1948) 19, 21

Texts.

Webster's New International Dictionary, Second Edition 26

Statutes.

Fifth Amendment, Constitution of the United States
28 U. S. C., § 1254(1) 6
26 U. S. C., § 7421 ..... 7, 13, 28, 30
26 U. S. C., § 6863 29
26 U. S. C., § 6861(b) 29
26 U. S. C., § 6331(a) 29
26 U. S. C., § 6861(c) 29
26 U. S. C., § 6861(g) 29
26 U. S. C. (I. R. C. 1939), § 872(f) 29

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. .....

HOMAN MFG. CO., INC., AN ILLINOIS CORPORATION,
Petitioner,

vs.

HAROLD R. ALL, DISTRICT DIRECTOR OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Homan Mfg. Co., Inc., an Illinois corporation, formerly named Shotwell Manufacturing Co., by its attorneys, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above case (*sub nom. Homan Mfg. Co., Inc. v. H. Allan Long, Director*, etc.)[1] on February 17, 1959.

1. Harold R. All replaced H. Alan Long as District Director of Internal Revenue at Chicago after the Court of Appeals decision herein and was thereafter substituted as defendant.

OPINIONS BELOW.

This case, involving a jeopardy assessment of asserted additional income taxes against petitioner, found by the District Court to have been "patently arbitrary [and] capricious" (Appendix B, p. 12, *infra*) and by the concurring Judge of the Court of Appeals to have been "deliberately put at [a] fantastic and insupportable figure simply so that Homan couldn't pay it, thus creating the appearance of jeopardy" (Appendix A, p. 5, *infra*), has twice been to the Court of Appeals for the Seventh Circuit.

A directly related, criminal income tax case, *United States v. Shotwell Manufacturing Co., et al.*, 355 U. S. 233, was decided by this Court on December 16, 1957. In that companion case, because of emphatic charges that the defense had there worked a perjurious fraud on the Courts in a suppression of evidence hearing and perhaps had bribed Internal Revenue personnel, this Court took the unusual action of permitting the prosecution to reopen a suppression of evidence hearing.

The post-trial hearing so directed by this Court was held in December 1958 and *has resulted in findings by Judge Nordbye of no perjury; nor was there any proof, or finding, of bribery of anyone, nor any attempt to prove the vicious allegation of the Huebner affidavit to this Court therein* (See 355 U. S. at p. 240) *that he had been kept off the stand in the original proceedings because he threatened to tell the truth.*

(Despite the collapse of the prosecutors' claims here as to the *Shotwell* disclosure, Judge Nordbye persisted in holding in bitter (and we say wholly unjustified) terms, that the *Shotwell* disclosure was not in "good faith" because, so he believes (we say erroneously), the corporate officials involved were guilty of personal tax evasion and should have said so in connection with the *Shotwell* disclo-

sure; he concludes that what he considers (on his view of the law) to have been "a dishonest and false disclosure cannot be held to be a timely voluntary disclosure" even though made at an appropriate date.

On the reopened hearing, defendants had suggested the propriety of Judge Nordbye recusing himself because he had announced in 1952 that he had "rather fixed views" on the subject of disclosure (*U. S.* v. *Shotwell*, R. 448). He declined to do so. His opinion on the reopened hearing shows that he thinks the *Shotwell* defendants must somehow have been bad; it is so laced with harsh language that it must be read closely and against the opinion of this Court for one to realize how it glosses the fact that the Government, given the greatest leeway, was unable, with a single exception, to convince him, of the truth of the specific charges made to, and carefully recapitulated by, this Court in numbered sentences at 355 U. S. p. 239 (partially quoted at Appendix p. 42, *infra*). Judge Nordbye has resentenced and the *Shotwell* case is again on its way to the Seventh Court of Appeals. His opinion appears as Appendix D hereto.[2]

2. We are entitled to make the outcome of the reopened hearing in *Shotwell* clear even though that case is not now before the Court, in order to remove from petitioner the "shadow" the Government's unusual charges there cast upon petitioner.

In its entire history this Court had never had a case like that presented by the Motion to Remand in *Shotwell*. Neither we nor the Solicitor General were able to find a precedent squarely in point. It is plain that this Court was deeply disturbed, not by questions of law as to what the Treasury's "voluntary disclosure" policy did or did not entail, for the Court denied certiorari on such questions and bypassed them in its opinion; it was concerned with a more fundamental question—the charge, from believed responsible sources, that the entire evidence as to a disclosure was wholly a perjurious fabrication of which the record should be "cleansed."

So serious a charge, both in its effect upon this Court and upon the citizens against whom it was leveled, should have been made only upon unassailable evidence. But the affidavits on which it was based have been demonstrated to have been so flagrantly false that they will leave disturbing questions in the Treasury and Jus-

The opinion of the Court of Appeals (Judges Schnackenberg and Hastings, Chief Judge Duffy concurring in a separate opinion), rendered February 17, 1959 in support of the judgment sought to be reviewed here, is reported at 264 F. 2d 158 and appears as Appendix A hereto.

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tice Departments, and the courts, for a long time. The precepts of *Mesarosh* v. *U. S.*, 352 U. S. 1, and *Berger* v. *U. S.*, 295 U. S. 78, necessary to ethical administration of justice by public lawyers, were held for naught by someone in *Shotwell*. (Cf. *Napue* v. *Illinois*, No. 583 this term.)

However, "the darkest shadow" (Cf. 355 U. S. at 240) of polluting the courts, placed upon petitioner by that violation of public duty in *Shotwell*, has been removed, whatever Judge Nordbye's view may be as to the legal sufficiency of the *Shotwell* disclosure. Petitioner is entitled to stand free of the "shadow".

The facts, even as Judge Nordbye grudgingly concedes them to be, as to *what* was disclosed to Internal Revenue and *when* it was disclosed, are essentially the facts given on the original suppression hearing in *Shotwell*. They are far from those falsely asserted in the affidavits filed in this Court to the general effect that there had been no disclosure at all. Of the five charges recapitulated by this Court at 355 U. S. 239 (See Appendix, p. 42, *infra*), and the charge that Huebner was deliberately kept off the stand in the first hearing, Judge Nordbye finds only charge five was true. (We say he errs even as to charge five.) The result of the reopened hearing—a vindication of the original disclosure testimony—is the more notable in that neither Busby, Cain nor Sauber took the stand on the reopened hearing to bolster their original testimony. Sauber and Busby testified not at all and Cain (by reason of health), but briefly and only on new subjects. The prosecutors' stridently asserted charge of perjury collapsed of its own fetid weight.

The "darkest shadow" in Shotwell, therefore, now rests not upon petitioner but upon those who made or procured the false affidavits filed in this high Court. This Court recognized that the Motion to Remand filed with it created an inevitable dilemma, saying (355 U. S. at 242-3) in a pithy sentence which the Nordbye opinion ignores: "It is plain, that *either* the testimony in the District Court [in the original *Shotwell* suppression hearing] was untrue *or these affidavits themselves are the product of fraud.*"

Having found, as the evidence on the reopened hearing compelled him to, that the original relevant testimony in the District Court was essentially true, Judge Nordbye should have found who it was that inspired the fraudulent affidavits, for they did not spring into existence spontaneously. Untrue, they yet fitted one to another, like a hand to a glove—they scarcely could have fitted

The Findings of the District Court for the Northern District of Illinois, Eastern Division (Judge J. Sam Perry), not disturbed by the Court of Appeals, and its Conclusions and Decree, reversed by the Court of Appeals in the judgment sought to be reviewed, were entered March 24, 1958, are not reported, and appear as Appendix B hereto.

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so well by mere inadvertence, for while truth easily fits itself to truth, a series of lies will fit only by design.

But Judge Nordbye indirectly dismissed the unpleasant dilemma posed by this Court's opinion with the remark, "I do not believe that any government official has attempted to have any witness herein testify falsely" (Appendix D, p. 55, *infra*). Falsity of affidavits filed in our highest Court and regarded by it as important enough to be recapitulated in its opinion and to cause it to enter an unprecedented remandment order, should scarcely be so easily condoned.

Who is responsible for the fraudulent false affidavits? Duty to resolve that question rests more upon the Solicitor General than upon us. Certainly, we assume the Solicitor General accepted the affidavits in good faith, although it would have been desirable for him to have inquired more searchingly than he apparently did into the history behind them, for the record before Judge Nordbye showed that affiant Graflund, between November 1955 and the giving of his false affidavit to this Court, had been "interviewed" at least 13 times by Government employees and had given contrary statements; affiant Huebner was "interviewed" innumerable times and had given at least 7 statements having many contrary assertions in them; Revenue Agent Lima was "interviewed" at least 9 times (including a lie detector test in what he cynically termed "refresher courses". These interviews took place at times when those individuals were entirely uninfluenced by the defense and additionally had given sworn testimony before a grand jury at radical variance from their affidavits or representations to this Court.

The facts suggested in this note are far from irrelevant to the proceeding at bar because the affidavits of Justice and Treasury officials attached to the Motion to Remand (Amended) filed in this Court in *Shotwell* show that the Treasury campaign against Shotwell and its officers that culminated in the false affidavits in *Shotwell* and in the false assessment at bar was undertaken in 1955 as one campaign—the *false assessment* now at bar and the *false affidavits* in the *Shotwell* case were, we submit, illegal twins of the same parentage. Each fraudulent abuse of power reflects on the other and illumines the reckless drive to exterminate petitioner

The first opinion herein of the Court of Appeals (Judges Finnegan, Lindley and Swaim), rendered February 4, 1957, is reported at 242 F. 2d 645, and appears as Appendix C hereto.

JURISDICTION.

The judgment of the Court of Appeals was entered February 17, 1959; timely petition for rehearing was denied April 10, 1959. Jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254(1).

QUESTIONS PRESENTED.

(a) Are the courts without jurisdiction to enjoin collection of a jeopardy income tax assessment found to have been made arbitrarily, capriciously and without reasonable cause, solely because the taxing statute under which such assessment was made is a valid statute and the taxpayer is a person who might be liable to pay a legally determined tax thereunder, even though the assessment actually made has been made illegally and collection thereof would result in irretrievable damage to the taxpayer for which he would have no effective legal remedy?

(b) If Section 7421 of the Internal Revenue Code of 1954 is construed to deny the courts jurisdiction to enjoin collection of an illegally made jeopardy assessment, collection of which would bring special and irretrievable damage to the taxpayer, is the statute invalid as a denial of due process of law in violation of the Fifth Amendment to the Constitution of the United States?

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED.

The constitutional provision involved is the Fifth Amendment, which provides in part:

> "No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *"

The principal statute involved is 26 U. S. C. A. § 7421(a), which provides:

> "Except as provided in section 6212(a) and (c), and 6213(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." (The exception is here irrelevant.)

STATEMENT OF THE FACTS.

What the District Court found to be grossly illegal conduct Internal Revenue Service can be understood only in connection with the chronology of the *Shotwell* case:

In *Shotwell* it was asserted (and denied) that petitioner evaded alleged additional taxes of $254,000 on $454,000 income from black market sources in 1945 and 1946.[3] The defendants asserted that Shotwell (Homan) had collected cash black market premiums only to get cash to spend on black market premiums for raw materials; that the true amount of its black market receipts was balanced by black market expenditures; that when the defendants learned in early 1948 that Internal Revenue would not allow black market expenditures as deductible expenses, they made a "voluntary disclosure" to the Bureau's Chief Field Deputy in Chicago before any investigation had been commenced and, hence, were entitled to the immunity from prosecution which the Treasury repeatedly had promised as an inducement to taxpayers to voluntarily disclose irregularities, and in any event were entitled to suppression of the evidence furnished on the inducement of immunity. The trial court (Judge Nordbye) in 1952 held otherwise, and in 1953 the Shotwell defendants were convicted.

3. It is now conceded that testimony even as to these amounts was "exaggerated" (Appendix pages 44-5, *infra*), "*exaggerated*" being a mere delicate euphemism for perjury by the prosecutors' notorious and loathsome star witness, one David Lubben.

On June 15, 1955 the Court of Appeals for the Seventh Circuit held in the *Shotwell* case that the promised immunity was unenforceable but that the evidence surrendered in reliance on the promise should have been suppressed, and ordered a new trial (225 F. 2d 394). On August 18, 1955 the Court of Appeals denied the Government's petition for rehearing therein.

While the criminal case was in the foregoing status, the Service, on September 15, 1955, seized all of Homan's (Shotwell's) assets under a jeopardy assessment which asserted that the tax deficiency for 1945-6 was $1,036,000 rather than the $254,000 asserted on the criminal trial (plus $462,000 for the year 1944 not involved in the criminal case). The total assessment, including penalties and interest, was $3,172,000 (App. 235), whereas Homan's total assets were approximately $1,114,000 (App. B, 109). Enforcement of the assessment would have meant the corporate death of petitioner because it would not have been able to pay its franchise taxes, much less defend itself in the criminal case or litigate civilly as to whether it owed any taxes. Accordingly, on September 23, 1955, the instant suit, praying an injunction against collection, was filed (App. 15, *et seq.*).

THE COMPLAINT.

The verified complaint herein alleged, with respect to the invalidity of the assessment and levy (App. 24), that petitioner owed no additional taxes for the years 1944, 1945 and 1946, that the assessment was wholly arbitrary, capricious and unjustified, and was made after the time for assessment had expired. It further charged (App. 25) that "not merely is the assessment itself arbitrary, capricious and without reasonable basis, as heretofore alleged, but that no cause for a determination of jeopardy exists"; that the assessment and levies were "beyond the lawful authority of the defendant and that enforcement of them

or delivery of any of [petitioner's] property thereunder would deprive [petitioner] of its property without due process of law, in violation of the Fifth Amendment * * *" (App. 26).

PROCEEDINGS AND ORIGINAL SUMMARY JUDGMENT.

After due notice, a preliminary restraining order was entered herein by Judge J. Sam Perry September 26, 1955 (App. 35), and a preliminary injunction on September 28, 1955 (App. 40).

Answer was filed and plaintiff took a lengthy deposition (App. 72-232) of Revenue Agent Mannuel who principally made the assessment and had worked on nothing but this case since 1949. The agent testified wholly from memory and, on advice of the Justice Department, refused to produce his Report or any relevant notes, memoranda or computations justifying his conclusions (App. 104, 178, 179, 198, 200, 202, 203, 220, 224, 229, 230). On the strength of admissions in that deposition and other evidentiary material, taxpayer moved for summary judgment (App. 361, 367-369). The Government, on the strength of affidavits (App. 388-391) showing merely that the assessment had been made in accordance with proper formal procedures, also moved for summary judgment. The District Court (Judge Perry) on June 14, 1956, denied defendant's motion, granted plaintiff's, and permanently enjoined collection (R. 417).

FIRST DECISION OF COURT OF APPEALS.

On appeal from the summary judgment, the Court of Appeals for the Seventh Circuit, although recognizing that,

> "Homan bases its case on the theory that the assessment is so arbitrary and capricious that it is illegal" (Appendix C, p. 36, *infra*),

held that summary judgment was "improvidently granted"

and remanded the case to the District Court for a full trial and development of further "facts playing in, on or about the assessment" (Appendix C, p. 38, *infra*).

THE ATTEMPT TO TRY THE CASE AND FINAL JUDGMENT.

After remandment of the instant case to the District Court, petitioner, preparatory to trial, moved (App. B. 28) under Rule 34 for the production of specified Treasury documents pertaining to the assessment, the contents of which necessarily would furnish details lacking in the Agent's testimony and would disclose further "facts playing in, on or about the assessment." No objection was made that the documents were not relevant, or that good cause for their production had not been shown, but Government counsel refused to produce them, claiming privilege. The District Court ordered production (App. B. 30) and the Department of Justice asserted that all the documents had been delivered by the Treasury to the Attorney General who persisted with the claim of privilege (App. B. 32-35). The District Court thereupon, on March 24, 1958, entered final judgment (App. B. 104) under Rule 37 because of failure of discovery and, independently of the Rule, because of the facts already shown of record, voiding the assessment.

The District Court found (App. B. 107, *et seq.* Appendix B, p. 7, *infra*) (paragraph numbers below conform to the District Court's paragraph numbers):

> "2. The documents involved contain relevant and material evidence with respect to the validity of the assessment in question, or are reasonably calculated to lead to the discovery of admissible evidence. Many of them are shown by the testimony of the witness Mammel to be admissible in evidence and clearly requisite to a full and fair determination of the facts pertaining to the assessment. Although many of the facts

already are clear upon evidence thus far received, the plaintiff cannot fully and completely try its case, as it has been directed to do by the Court of Appeals, nor can this Court make the detailed evidentiary inquiry it believes the Court of Appeals felt was proper, if the said documents are withheld. * * *

"4. It is just (a) that the Court, exercising its dignity, powers and discretion under Rule 37 and its duty to protect citizens against taxation and deprivation of property except by due process of law, find; and it hereby does find that the defendant H. Alan Long is in default herein and that a judgment by default be entered against him and in favor of the plaintiff, the evidence that plaintiff is entitled to relief being satisfactory to the Court and the Court so finding, and (b) that insofar as detailed facts are reasonably established by a fair preponderance of the evidence heretofore received, that subsidiary findings be and hereafter are made thereon, and that the decree of the Court and such findings rest not merely upon such default but independently thereof, and concurrently therewith, upon the evidence thus far received."

"5-8. The assessment in question is patently arbitrary, capricious and wholly void.

"5-9. In making his determination of taxable net income Mammel made no attempt to be fair to the taxpayer at any time; he proceeded on the assumption that he was only required to be fair to the taxpayer 'if I can' and did not adhere even to that standard.

"5-10. The alleged additional income determined by Mammel consists principally of (a) alleged overceiling cash 'premiums' paid by one Lubben which asserted payments were the subject matter of the criminal case; (b) approximately $964,000 gross income which it is asserted should have resulted from extra manufacture of candy, which Mammel believes should have occurred but which is not reflected on the records of the company; and (c) disallowance of sundry items of expense. In determining item (a) above, Mammel both relied upon, and misconstrued, items of evidence ordered suppressed in the criminal case, relied upon altered and changed purported records of

said Lubben, wholly failed to make any good faith practical judgment as to offsetting black-market expenditures, and acted essentially upon an informal determination he had made in late 1951 or early 1952 and ignored relevant facts brought to his attention between that time and September 1955 showing that at least parts of his initial determination were erroneous. In determining item (b) above Mammel was wholly imaginary and did not even purport to find whether the so-called extra production remained in inventory or was sold and admits that he had no evidence that so much as one pound of this asserted extra 4,000,000 pounds of candy was ever sold or shipped or remained in possession. In determining substantial disallowances comprising item (c) above Mammel failed to follow reasonable procedures to test the verity of plaintiff's claimed deductions but made disallowances by whim and caprice on the excuse that he 'didn't have time' between 1949 and 1955 to investigate. The arbitrary, capricious and unlawful actions in this finding described were carried into and are substantially found in the determination of November 14, 1955.

"5-11. [Revenue Agent] Mammel's determinations were arbitrary, capricious and unlawful in the extreme. Such action sprang from Mammel's lack of the requisite mental capacity to make a fair, reasonable and lawful assessment. Mammel suffered a complete mental break-down on March 19, 1953. The record shows that in 1955 he had not recovered sufficiently therefrom to competently exercise his office. Upon examination herein in February 1956 Mammel was unable to recall or to understand basic rules of taxation which he should have taken into consideration when he made the assessment of September 1955. He also was unable to recall important points developed during the criminal trial of late 1953 to which he should have applied fair and mentally competent judgment in making the 1955 assessment. Mammel did not possess or exercise requisite mental competence in making the instant assessment.

"5-12. The making of the assessment and jeopardy

levy has had the effect of completely tying up, with *de minimis* exceptions, all of the taxpayer's assets. Unless the arbitrary assessment and levy is set aside the taxpayer will be without funds to pay the fees and taxes necessary to maintain its corporate existence. If collection upon the jeopardy levy was permitted, all of the taxpayer's assets would be seized and it would be without funds to engage lawyers, accountants or pay any other expenses necessarily incident to a legal proceeding to recover the unlawful exaction resulting from Mammel's arbitrary and capricious assessment."

The District Court concluded that not merely the steps to collect the assessment were illegal but the assessment itself, *i.e.*, the tax as it was asserted to apply to petitioner, was wholly void and of no legal effect[4] and that plaintiff was entitled to a permanent injunction against the enforcement of the assessment and levy (App. B. 113). The District Court held

"The assessment * * * and the deficiency notice * * * were made unlawfully and in violation of plaintiff's constitutional rights, and were, and are, beyond the jurisdiction of the Commissioner of Internal Revenue, and are wholly null and void."

THE SECOND APPEAL.

Upon the second appeal, leading to the decision sought to be reviewed, the Government did not contest the factual correctness of the District Court's foregoing findings of fact. They stand as the facts of the case.

Upon oral argument in the Court of Appeals Assistant Attorney General Richard Roberts confessed that the point of privilege was not well taken, saying frankly, as we recall

4. Observe that the first Court of Appeals opinion herein characterized this case as "a frontal attack on the assessment". (Appendix C, p. 21, *infra*).

his words,[5] "If we have to rely upon privilege, we are sunk," or, "* * * we are done."

The Government's position in the Court of Appeals was that granting everything in the complaint and in the evidence to be true, Section 7421(a) of 26 U. S. C. A. forbidding injunctions restraining the assessment or collection of any tax, precluded equitable relief—that unless a potential taxpayer made a completely clear affirmative showing that he owed no tax at all he could obtain no injunctive relief no matter how illegal the assessment against him was or how ineffective or unavailable his other theoretical remedies.

The Court of Appeals reversed on the theory set forth in the opening paragraphs of our Reasons for Allowance of the Writ.

REASONS FOR ALLOWANCE OF THE WRIT.

Until the Court of Appeals decision herein it was unbroken law that when a purported Federal tax was illegally *assessed* or *levied* against a potential taxpayer, and there were extraordinary circumstances making other forms of relief illusory or non-effective, Federal courts, to protect citizens against seizure of their property except by due process of law, would grant injunctive relief. Admittedly, situations that permitted this relief were few and it was granted sparingly.

The first opinion of the Court of Appeals herein (Appendix C, p. 29, *infra*) recognized this law, saying that (a) "When compelling factual reasons were established in various earlier cases, federal courts have bypassed Section 7421, taken jurisdiction and exercised their equity power" and, (b) that Treasury authority to make jeopardy assess-

5. Oral arguments in the Seventh Court of Appeals are not regularly recorded, and, so far as we know, neither party had a special reporter present for the oral argument of this case.

ments of asserted income taxes was, "like all first aid measures * * * subject to abuse or improper use. * * * We are not now saying that either the bond section or tax court review are the panacea for all ills suffered when a jeopardy assessment is utilized * * *" (Appendix C, p. 26, *infra*). However, that panel of the Court, wanted a more complete development of the facts pertaining to the assessment.

The instant decision, which accepts the District Court's findings that the jeopardy assessment herein was made with wanton, and necessarily deliberate, disregard of important relevant facts (or absence of facts), and of important relevant law, *i. e.*, findings that authority to make an assessment was abused, or improperly used, so that it was not intended to be a real assessment but a deliberate overvaluation, has nevertheless termed the assessment a mere "step taken to collect" (Appendix A, p. 4, *infra*), and as such a "step" held it to be immune from injunctive relief, regardless of how illegal or abusive the so-called "step" (assessment) is.

The supposed distinction between what the Court of Appeals calls "illegality of the tax itself" and illegality in "steps to collect," is wholly new and ignores the disjunctive distinction between "assessment" and "collection" in the very statute, (p. 7 *ante*) on which the opinion relies. It is fallacious because a tax has no existence save in the cold print of the statute book until "steps" are taken to determine its supposed amount (assess it) as against a potential taxpayer and to collect it. Other Circuits have enjoined "steps to collect", as for example, a sale of goods to secure dollar collection under an admittedly valid jeopardy assessment (Eighth Circuit), or an assertion of so-called transferee liability (Fourth Circuit).

The effect of the instant opinion is that there never can be an injunction to restrain collection of an asserted income tax from a *potential* income taxpayer no matter how far

the boundaries of due process are exceeded in the purported assessment because, conceivably, a potential taxpayer *could* owe some income tax in some amount. Or, stated another way, unless a plaintiff is a charity or otherwise wholly exempted from the ambit of income taxes, he cannot obtain relief even though he actually owes no tax whatsoever and a jeopardy assessment and seizure of all his assets has been made corruptly not to obtain revenue but to accomplish other objectives. The opinion limits "illegality" which will warrant equitable intervention solely to situations where no tax of the variety imposed could possibly be laid against the complainant.

Baldly, the decision sought to be reviewed assumes that the assessment was deliberately placed at an extortionately high figure that cannot possibly be justified and is far beyond taxpayer's ability to pay; that the assessment is no mere rational mistake nor erroneous, but good faith, estimate of liability; that it is a deliberate over-assessment to make sure that petitioner would be deprived of all its property and means of defense; that enforcement of it will be an effective death sentence on the corporation. Nevertheless it holds that the courts, bound to enforce a Constitution which guarantees that citizens' property be taken only by due process of law, cannot effectively intervene. We submit the simple statement of the proposition demonstrates the necessity for review.

If by any chance it should be the law that the present decision is correct and that supposedly free citizens are the helpless victims of the prejudices or idiosyncrasies of administrative servants, we submit that this Court still should review the case and say so clearly so that Congress can enact such remedial legislation as may be necessary to effectively hold taxing officers within bounds of the Constitution.

If, as we contend, the instant decision is erroneous,

certiorari should be granted so that it may be reversed, petitioner be accorded its constitutional right to its property unless it be taken by due process of law, and the conflict with the law of other Circuits be eliminated.

Specifically, certiorari should be granted because:

1.

The opinion of the Court of Appeals for the 7th Circuit in attempting to create a distinction between what it terms "illegality in collection of a tax" and "illegality of the tax itself," is in conflict with decisions of the Courts of Appeals for the 2nd, 4th, 5th, 6th, 8th and 9th Circuits and is in conflict with the earlier decision herein by a different panel of the Court of Appeals for the 7th Circuit.

2.

The Court of Appeals for the 7th Circuit has decided an important question of Federal tax and equity law contrary to this Court's decision in *Miller* v. *Standard Nut Margarine Co.* (284 U. S. 498), by interpreting that decision to mean that no person who possibly can be subject to income taxes can ever secure equitable intervention against a purported assessment of such taxes no matter how illegally and capriciously the assessment is made, and no matter how ineffective any other supposed remedies may be.

3.

The Court of Appeals for the 7th Circuit has decided an important question of Federal law contrary to this Court's decision in *Helvering* v. *Taylor* (293 U. S. 507), by holding that where the Commissioner of Internal Revenue's determination of an asserted tax liability is shown to be without rational foundation and excessive, it still will

be accepted as "legal" unless the asserted taxpayer proves he owes nothing whatsoever.

4.

By treating petitioner's complaint and proof, and the District Court's undisturbed findings of fact, that Internal Revenue's determination that there was a tax was arbitrary, capricious and unlawful in the extreme, as a mere challenge to "steps taken by the Government to collect" a presumably valid tax and not as an assertion that a tax so arrived at is illegal, the Court of Appeals for the 7th Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

ARGUMENT.

The supposed distinction drawn by the Court of Appeals for the 7th Circuit between "illegality of the tax itself" and "illegality in steps of collection" is without merit and is in conflict with the decisions of the Courts of Appeals for the 2nd, 4th, 8th and 9th Circuits and with their interpretation of this Court's decisions in *Miller* v. *Standard Nut Margarine Co.*, 284 U. S. 498, and *Hill* v. *Wallace*, 259 U. S. 44. (*National Foundry Co. of N. Y., Inc.* v. *Director of Internal Revenue*, 229 F. 2d 149 (C. A. 2, 1956); *Shelton* v. *Gill*, 202 F. 2d 503 (C. A. 4, 1953); *Yoke* v. *Mazzella*, 202 F. 2d 508 (C. A. 4, 1953); *Smith* v. *Flinn*, 261 F. 2d 781 (C. A. 8, 1958), and *Yoshimura* v. *Alsup*, 167 F. 2d 104 (C. A. 9, 1948)).

In each of the cited Courts of Appeals cases the courts (a) relied upon and applied the teachings of this Court in *Miller* v. *Standard Nut Margarine Co.* and *Hill* v. *Wallace*, and (b) enjoined revenue officials from illegal conduct in what manifestly were "collection steps." Specifically, *Smith* v. *Flinn*, 261 F. 2d 781 (C. A. 8, 1958), restrained defendant Director from selling, contrary to statutory requirements of 26 U. S. C. § 6863, property seized "for the collection of tax" under a jeopardy assessment; *National Foundry Co. of N. Y., Inc.* v. *Director of Internal Revenue*, 229 F. 2d 149 (C. A. 2, 1956), restrained the defendant Director from collection of penalties and interest accruing after the filing of a bankruptcy petition, the tax assessment itself having been allowed in the bankruptcy decree; *Shelton* v. *Gill*, 202 F. 2d 503 (C. A. 4, 1953), restrained levy against plaintiff as transferee of a third person liable for the tax; *Yoshimura* v.

Alsup, 167 F. 2d 104 (C. A. 9, 1948), restrained collection of an assessment made by virtue of an executed Form 870 (consent to assessment) which the Court found to have been obtained by fraudulent and coercive conduct of revenue agents; *Yoke* v. *Mazzello*, 202 F. 2d 508 (C. A. 4, 1953), restrained levy under jeopardy assessment where the defendant Director had refused to accept a bond the signatories of which were satisfactory to him.

In the latter case the Court succinctly summarized the law as follows (emphasis supplied):

> "This [injunctive] course has been followed in situations of dire necessity where it was believed that *the assessment was clearly unlawful*, or was levied against the wrong person, and the enforcement of the tax would inflict an irreparable loss upon the complainant * * *."

In *Miller* v. *Standard Nut Margarine Co.*, 284 U. S. 498 at page 509, this Court referred to the rule permitting limited equitable intervention as a "salutary" rule and said:

> "Independently of, and in cases arising prior to, the enactment of the provision (Act of March 2, 1867, 14 Stat. 475), which became R. S., § 3224, this court in harmony with the rule generally followed in courts of equity held that a suit will not lie to restrain the collection of a tax upon the sole ground of its illegality. * * * this court likewise recognizes the rule that, in cases where complainant shows that in addition to the illegality of an exaction in the guise of a tax there exist special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence, a suit may be maintained to enjoin the collector. (Citing cases.) Section 3224 is declaratory of the principle first mentioned and is to be construed as near as may be in harmony with it and the reasons upon which it rests. (Citing cases.) The section does not refer specifically to the rule applicable to cases involving exceptional circumstances. The general words employed are not sufficient, and it would

require specific language undoubtedly disclosing that purpose, to warrant the inference that Congress intended to abrogate that salutary and well established rule. * * *"

The test of "illegality" announced in the decision sought to be reviewed, was not the law of the 7th Circuit under the first decision herein, which clearly was predicated on the belief that a case of "illegality" *could* be made by one who was within the general ambit of the income tax laws. Obviously Judges Finnegan, Lindley and Swaim felt that it would be possible to show a cause of action (as did the District Court) on the basis of the law in other circuits. Judges Schnackenberg and Hastings arrive at a contrary result, supposedly on the strength of intervening authority in the 7th Circuit and although Judge Duffy concurs his concurrence seems to us to be mostly dissent.

The opinion sought to be reviewed limits "illegality" which will warrant equitable intervention solely to situations where no tax whatsoever of the variety assessed could possibly be laid against the complainant. This straitened interpretation of "illegality" is in conflict with the decisions of the Courts of Appeals for the 2nd, 4th, 6th, 8th and 9th Circuits and with their interpretation of this Court's decisions in *Miller* v. *Standard Nut Margarine Co.*, 284 U. S. 498, and *Hill* v. *Wallace*, 259 U. S. 44. (*National Foundry Co. of N. Y., Inc.* v. *Director of Internal Revenue*, 229 F. 2d 149 (C. A. 2, 1956); *Yoke* v. *Mazzello*, 202 F. 2d 508 (C. A. 4, 1953); *Shelton* v. *Gill*, 202 F. 2d 503 (C. A. 4, 1953); *Midwest Haulers, Inc.* v. *Brady*, 128 F. 2d 496 (C. A. 6, 1942); *Smith* v. *Flinn*, 261 F. 2d 781 (C. A. 8, 1958); *Yoshimura* v. *Alsup*, 167 F. 2d 104 (C. A. 9, 1948).)

In each of the foregoing cases the various Courts of Appeals granted injunctive relief notwithstanding that the taxpayer *conceded that he was subject to the particular va-*

riety of tax sought to be imposed. Specifically, in *Midwest Haulers, Inc. v. Brady*, 128 F. 2d 496 (C. A. 6, 1942), the taxpayer was subject to social security taxes and had filed returns and paid such taxes with respect to individuals in its employ—the sole question was as to whether certain additional persons were its "employees"; in *Yale v. Mazzello*, 202 F. 2d 508 (C. A. 4, 1953), the taxpayer was subject to income taxes on income from a restaurant for at least some of the years covered by the jeopardy assessment and had filed tax returns and paid the tax shown thereon for some of the years involved; in *Shelton v. Gill*, 202 F. 2d 503 (C. A. 4, 1953), complainant conceded his liability as a transferee of his father but obtained injunctive relief against liability as a transferee of one Duckworth; in *Yoshimura v. Alsup*, 167 F. 2d 104 (C. A. 9, 1948), taxpayer had returned and paid income taxes and was further liable for at least the additional tax attributable to a mis-entry of $150.00 on his books; in *National Foundry Co. of N. Y., Inc. v. Director of Internal Revenue*, 229 F. 2d 149 (C. A. 2, 1956), the liability of taxpayer for additional taxes was recognized and had been provided for in the bankruptcy order—injunctive relief was granted solely as to tax penalties and interest accruing after the date of the filing of the bankruptcy petition; in *Smith v. Flinn*, 261 F. 2d 781 (C. A. 8, 1958), the determination of additional tax was pending before the Tax Court and the opinion makes clear that the injunctive relief relates solely to the sale of property seized under jeopardy assessment while the Tax Court proceeding was pending.

Basically the decision sought to be reviewed is an erroneous interpretation of *Miller v. Standard Nut Margarine Co.*, 284 U. S. 498. *Nut Margarine* does not stand for the narrow proposition that equity will intervene only where there is no possibility any tax of the variety involved can lawfully be imposed upon the complainant. It

is true that that was the factual situation there. But in *Nat Margarine* this Court stated that the statutory provision prohibiting injunctions against assessment or collection of taxes (now 26 U. S. C. §7421) was merely codification of the existing common-law rule that suit will not lie to restrain collection "upon the sole ground of its illegality" unless there were in addition special and extraordinary circumstances.

In *Nat Margarine* the Court, among other cases, relied upon its prior decision in *State Railroad Tax Cases*, 92 U. S. 575, in which an involved attack was made upon the application of an Illinois franchise tax against railroads involving a valuation of railroad capital stock (which attack was held to be without merit), this Court reviewed the common law and state decisions on injunctive relief against taxes thoroughly and said (p. 613, emphasis supplied):

> "It has been repeatedly decided that neither the mere illegality of the tax complained of, nor its injustice nor irregularity of themselves, give the right to an injunction in a court of equity. *Moores v. Smedley*, 6 Johns. Ch. 27; *Dodd v. Hartford*, 26 Conn. 239; *Green v. Munford*, 5 R. I. 478; *Messert v. Supervisors of Columbia*, 50 Barb. 190; *Dow v. Chicago*, 11 Wall. 108; *Hannewinkle v. Georgetown*, 15 Wall. 548.
>
> "The government of the United States has provided, both in the customs and in the internal revenue, a complete system of corrective justice in regard to all taxes imposed by the general government, which in both branches is founded upon the idea of appeals within the executive departments. If the party aggrieved does not obtain satisfaction in this mode, there are provisions for recovering the tax after it has been paid, by suit against the collecting officer. But there is no place in this system for an application to a court of justice until after the money is paid.
>
> "That there might be no misunderstanding of the

universality of this principle, it was expressly enacted, in 1867, that 'no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.' Rev. Stat. sect. 3224. And though this was intended to apply alone to taxes levied by the United States, it shows the sense of Congress of the evils to be feared if courts of justice could, *in any case*, interfere with the process of collecting the taxes on which the government depends for its continued existence. It is a wise policy. It is founded in the simple philosophy derived from the experience of ages, that the payment of taxes has to be enforced by summary and stringent means against a reluctant and often adverse sentiment; and to do this successfully, other instrumentalities and other modes of procedure are necessary, than those which belong to courts of justice. See *Cheatham* v. *Norvell*, decided at this term; *Nickoll* v. *United States*, 7 Wall. 122; *Dows* v. *Chicago*, 11 Wall. 108.

"In this latter case, this court, after commenting upon the necessary reliance of the State governments upon the prompt collection of the taxes for their support and maintenance, and the ill consequences of interference with their proceedings in that matter, says, 'No court of equity will, therefore, allow its injunction to issue to restrain their action, *except where it may be necessary to protect the citizen whose property is taxed, and he has no adequate remedy by the ordinary processes of the law.* It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or, when the property is real estate, throw a cloud upon the title of complainant before the aid of a court of equity can be invoked.' So, in the case of *Hannewinkle* v. *Georgetown*, the court says, 'It has been the settled law of this country for a great many years, that an injunction bill to restrain the collection of a tax on the sole ground of the illegality of the tax cannot be maintained. There must be an allegation of fraud, that it creates a cloud upon the title, that there is apprehension of a multiplicity of suits, or some cause presenting a case of equity jurisdiction.' 15 Wall. 548. If

do not propose to lay down in these cases any absolute limitation of the powers of a court of equity in restraining the collection of illegal taxes; but we may say, that, in addition to illegality, hardship, or irregularity, the case must be brought within some of the recognized foundations of equitable jurisdiction, and that mere errors or excess in valuation, or hardship or injustice of the law, or any grievance which can be remedied by a suit at law, either before or after payment of taxes, will not justify a court of equity to interpose by injunction to stay collection of a tax."

The effect of the Court of Appeals decision at bar is, contrary to the foregoing law, to lay down an absolute limitation, and a very stringent and unprecedented one, on the powers of a court of equity. Unless a complainant can show that the tax statute involved is unconstitutional or that he is a person wholly exempt from the tax (as, for example, an eleemosynary institution), he cannot possibly obtain injunctive relief no matter how corruptly or illegally an assessment is made against him or how illusory any other supposed remedies may be. That is not the law as this Court announced it in 1875 in the *State Railroad Tax Cases*, or in 1932 in the *Nut Margarine* case.

Specifically, the doctrine at bar would mean that with respect to the one tax most citizens are most concerned with—the income tax, and which concededly can be abused by officials who may be vindictive or irrational—the great bulk of citizens are absolutely debarred from equitable relief and relegated solely to remedies that may, as here, be wholly illusory.

This Court has never announced a doctrine such as is announced in the decision at bar. Nor has this Court ever said that it is incumbent upon a protesting taxpayer who shows that a tax levied against him is flagrantly wrong

and cannot possibly be sustained, to show also that he owed no tax whatsoever, or, if he owes any, what the correct amount of it is. In *Helvering* v. *Taylor*, 293 U. S. 507, this Court said at page 514:

> "We find nothing in the statutes, the rules of the board or our decisions that gives any support to the idea that the commissioner's determination, shown to be without rational foundation and excessive, will be enforced unless the taxpayer proves he owes nothing or if liable at all, shows the correct amount."

A purported tax assessment, of whatever variety, that is purposely and deliberately or irrationally made too high, in fact is no assessment at all, for "assessment" by definition (see *Webster's* New International Dictionary, Second Edition) must be a "valuation". While Congress, by empowering revenue officials to make jeopardy assessments of income taxes, undoubtedly empowered them to make valuations which were not precise but were estimates on the best evidence available, it never authorized any taxing officer to deliberately or irrationally over-value or over-assess.

The present opinion, if allowed to stand, will operate as a warrant to taxing officers that they need make no effort to be fair to taxpayers; that they need not even attempt to exercise discretion on subjects on which they must exercise fair and reasonable discretion; that having so acted they can seize all of a citizen's property. That is what the proof undeniably shows.[6] The constitutional

6. We are not called upon to defend or show the soundness of the District Court's factual findings as to the utter capriciousness and irrationality of the monstrous assessment here levied. Those findings stand as the facts of the case. It is significant that the Government did not attempt to attack them in the Court of Appeals but conceded that they were sound, arguing at pages 12 and 13 of its brief in that Court as follows:

> "There must be a showing that the tax was illegally assessed, coupled with a showing of 'special and extraordinary

guaranty of due process would become a mockery if such was to become the law.

There obviously must be some point beyond which the Courts will not let tax collectors go in seizing property under the guise of an "assessment." Whatever the Treasury's powers may be with respect to jeopardy assessments, they necessarily are limited to making "assessments." Congress never has authorized the Treasury to deliberately "mis-assess" and could not constitutionally do so if it would. A jeopardy assessment may, perhaps, be imprecise, *but it cannot be a deliberate over-valuation or it loses its necessary quality of "assessment."* A jeopardy assessment, like any other tax assessment, is not the mere mechanical matter of filling out the requisite forms—an "assessment," by definition must be *honest valuation.*

The various state courts, enforcing a public policy against equitable interference with collection of revenue that is as strong as the Federal policy, have long recog-

> circumstances' sufficient to bring the case within a recognized head of equity jurisdiction. * * * *In itself a showing of illegality is not enough.* * * *
>
> "Viewed in this light, *the issue in the case at bar is not the truth or falsity of taxpayer's assertion that the tax was illegally assessed.* Instead, *the real crux* of the case is whether the taxpayer has given any indication that there are special and extraordinary circumstances * * *."

Moreover, and shocking through the revelations of the Mammiel deposition as to how this assessment was put together were, the Government's improper refusal to obey the District Court's order for production of relevant documents raises a strong presumption that the actual documents would have served to show even further illegality. The Department of Justice was forced to confess in the Court of Appeals that its claim of privilege could not be sustained (p. 13, *ante*). We think it axiomatic that the Government should always be willing, indeed, anxious, to tell a citizen precisely how, and upon what basis, it arrives at a determination that he owes more taxes. We suggest it is manifest that an assemblage of taxing officers and lawyers would not decide to stand upon an illegal claim of privilege as they did here (App. B, 89 *et seq.*) unless they feared the revelations that would come from producing the relevant records.

nized that there may be injunctions, where a purported real estate assessment is a deliberate over-valuation or over-assessment. In such rare situations the real estate, of course, is subject to some tax (and therefore under the reasoning of the Court of Appeals at bar no injunction ever could be issued), nevertheless the state courts issue injunctions. We quote from typical cases:

In *Lambrecht* v. *Wilson*, 290 Ill. 547, 549-50, the Court said:

> "An over-valuation or an under-valuation of property will not, of itself and alone, invalidate an assessment (*Barkley* v. *Dale*, 213 Ill. 614), but where the valuation is so grossly out of proportion to the true value as to show that the assessor could not have been honest in his valuation the assessment may be impeached for fraud, and by reason of fraud in making the assessment *the assessment amounts to no assessment at all.*" (Emphasis added.)

In *Sunday Lake Iron Co.* v. *Wakefield*, 186 Mich. 626, 153 N. W. 14, 16, the Court recognized the long-standing rule that a tax assessment made with prejudice or a disregard of duty is invalid and should be enjoined:

> "An assessment is not fraudulent merely because of being excessive, if the assessors have not acted from improper motive; *but if it is purposely made too high through prejudice or a reckless disregard of duty in opposition to what must necessarily be the judgment of all competent persons* • • • *the case is a plain one for the equitable remedy by injunction. In such case the tax is necessarily invalid.*" (Emphasis added.)

The interpretation of 26 U. S. C. § 7421 by the decision sought to be reviewed, which would make that statute an *absolute* bar to equitable intervention unless the complainant is wholly outside the ambit of the taxing statute involved, would render the statute unconstitutional as one permitting administrative seizure of property without due

process of law. None of the so-called "remedial" or review provisions of the revenue laws would, in the context of this case, afford Homan its constitutional right of due process:

Appeal to the Tax Court would not prevent the immediate seizure of all of Homan's assets. Homan needed the immediate protection afforded only by a court of equity. Actually, there could be no appeal to the Tax Court until the Commissioner issued a deficiency notice (*Mason* v. *Commissioner*, 210 F. 2d 388, C. A. 5, 1954), and this deficiency notice need not be (and was not) issued by the Commissioner until sixty (60) days after the jeopardy assessment (26 U. S. C. § 6861(b)). In the interval nothing—other than the injunctive relief—would prevent the District Director from seizing all of Homan's assets (26 U. S. C. § 6331(a)). Even after Tax Court jurisdiction is invoked the Commissioner could levy on all of taxpayer's assets thereby rendering it totally unable to proceed in the Tax Court (Appendix B, p. 13, *infra*).

Under the rule of *Flora* v. *U. S.*, 357 U. S. 63 (1958), no suit for refund can be brought unless the total amount of the assessment, including penalties and interest has been paid. It is manifestly impossible for Homan to pay an assessment three times its total assets and then bring a suit for refund.

The statutory provisions (26 U. S. C. § 6861(c) and (g)) for administrative relief by abatement in the absence of "jeopardy" or partial abatement of excessive assessment are of no assistance to Homan, in view of the position taken by the District Director in his answer and the established facts as to the purpose of deliberate misassessment to create the appearance of jeopardy in the instant case.

Nor can it be said that the provisions for posting of a bond in twice the amount of the tax (26 U. S. C. § 6863;

26 U. S. C. (1939 I. R. C.) § 872(f)) affords Homan any relief when its assets are but one-third of the assessment.

On the first appeal in this case, the Court of Appeals noted:

> "Congress gave the Secretary, or his delegate, a stop-gap remedy under § 6861. Like all first aid measures it is subject to abuse or improper use. The Code does provide interim relief for a taxpayer if he is able to give a bond under § 6863 and, of course, a review of the assessment is available in the tax court. We are not now saying that either the bond section or tax court review are the panacea for all ills suffered when a jeopardy assessment is utilized by the government."

Courts of Appeals in other Circuits have also recognized, in particular cases, the inadequacies of Tax Court review, suits for refund, administrative relief, or posting of bond to stay collection and have therefore granted injunctive relief. *Shelton* v. *Gill*, 202 F. 2d 503 (C. A. 4, 1953); *Midwest Haulers, Inc.* v. *Brady*, 128 F. 2d 496 (C. A. 6, 1942); *John M. Hirst & Co.* v. *Gentsch*, 133 F. 2d 247 (C. A. 6, 1943).

The rule announced by the opinion sought to be reviewed applies to all types of taxation, income, estate, gift, excise, employment, alcohol, tobacco, gasoline or occupational. Except with respect to income, estate and gift taxes, the taxpayer's only ordinary remedy is to pay the assessment and sue for a refund under the rule of *Flora* v. *U. S.*, 357 U. S. 28 (1958); the Tax Court has no jurisdiction as to such other taxes, nor is administrative abatement or bond posting provided as to them.

It is, therefore, apparent that taxing authorities could arbitrarily *mis-assess* these other kinds of taxes at figures in excess of a taxpayer's assets, and thereby preclude the taxpayer from a judicial determination of his *true* tax liability unless the injunctive remedy was preserved as

utilized in those rare cases where it is necessary. If 26 U. S. C. § 7421(a) is construed to preclude injunctive relief in such instances as we have posed, and as it does under the decision sought to be reviewed, it would follow that either it, or these other taxing statues are unconstitutional.

CONCLUSION.

The revenues of the United States can be collected without difficulty within the confines of the Constitution. It is not necessary for the courts to extend *carte blanche* to revenue officials to do whatever they wish.

It is respectfully submitted that the writ of certiorari should issue.

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APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS.
for the Seventh Circuit.

No. 12416 SEPTEMBER TERM, 1958—JANUARY SESSION, 1959.

HOMAN MFG. CO., INC., an Illinois corporation,
Plaintiff-Appellee,
vs.
H. ALAN LONG, Director of Internal Revenue,
Defendant-Appellant.

On Appeal from the Order of the United States District Court for the Northern District of Illinois.

February 17, 1959

Before DUFFY, *Chief Judge*, and SCHNACKENBERG and HASTINGS, *Circuit Judges*.

SCHNACKENBERG, *Circuit Judge*. H. Alan Long, Director of Internal Revenue, defendant, herein referred to as the Director, has appealed from a final decree of the district court permanently enjoining him and his agents, servants and successors, from making any assessment or levy against Homan Mfg. Co., Inc., an Illinois corporation, plaintiff, herein referred to as Homan, for alleged income, declared value excess profit and excess profit taxes for the years 1944, 1945 and 1946 based (a) in

whole or in part on determinations of one Charles J. Mammel,[1] or (b) in whole or in part upon any of the documents ordered to be produced by that court's order of February 19, 1958 and refused to be produced; and from using said determinations in any court or in any proceedings whatsoever to which Homan is a party and in which the purpose, or one of the purposes, is to assess or determine additional income, declared value excess profit or excess profit taxes against Homan for the years 1944, 1945 and 1946, or from using therein any of the material referred to in this clause (b).

Homan's complaint was filed September 23, 1955. It sought to enjoin the then district director from collecting income and excess profits taxes under a jeopardy assessment[2] totaling more than $3,000,000. From a judgment granting a permanent injunction, as prayed in the complaint, defendant appealed and we reversed and remanded the case for further proceedings in the district court. *Homan Mfg. Co.* v. *Long*, 242 F. 2d 645.

Following the remand, Homan moved under rule 34 of the Federal Rules of Civil Procedure[3] for the production of all documents, reports and memoranda in the government's possession having anything to do with the assessment levied against it. The district court granted the motion, but the director declined to produce on the grounds that the material in question was privileged. Thereupon the court "by reason of default of the director", found that all of the "allegations of the complaint, as amended, have been established, and adopts the same as findings herein". Then, without any hearing on the

1. Mammel was a United States internal agent and according to Homan his figures constitute the basis of an assessment against it.

2. Act May 28, 1938, c. 289, § 273, 52 Stat. 537, 1939 code, 26 U.S.C.A. § 273(a). In all material respects § 6861 of the 1954 code, 26 U.S.C.A. § 6861, is identical with the 1939 code.

3. 28 U.S.C.A., Rule 34.

merits, the district court found that Homan's returns for the years 1944-1946 were not fraudulently made.

In the decree from which this appeal was taken, the court also enjoined the Director and his agents, servants and successors, from using any of the material covered by the production order in any court proceeding brought to determine taxpayer's income or excess profits tax liability for the years 1944-1946; and lastly, the court permanently enjoined such persons from using the above material to assess additional income, declared value excess profit or excess profits taxes against Homan for the years 1944-1946.

The director contends that the district court erred in not dismissing this suit for lack of jurisdiction.[4] He relies on 26 U.S.C.A. §7421 (a), which reads:

> "Except as provided in section 6212(a) and (c), and 6213 (a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." (The exception is here irrelevant.)

In *Mensik* v. *Long*, 261 F. 2d 45, 47, we stated that "prevailing case law has, on occasion, palliated the strictures Congress enacted in § 7421." To the same effect see *Melvin Bldg. Corp.* v. *Long*, F. 2d , in which case we said:

> "* * * Significantly it [taxpayer] does not say that the tax itself was illegal, which is one of the facts which it must establish to avoid the bar of § 7421 (a). * * *"

In *Mensik* v. *Long*, *supra*, at 47, we said:

> "What constitutes justification for such alleviation has been adequately set forth in *Miller* v. *Standard Nut Margarine Co.*, 1932, 284 U.S. 498, 52 S. Ct. 260,

4. This point, although mentioned, was not decided in the previous appeal to this court. *Homan Mfg. Co.* v. *Long*, 242 F. 2d 645.

76 L.Ed. 422. There the Supreme Court said, 2[illegible] U.S. at page 509, 52 S. Ct. at page 263, 'a suit wi[illegible] not lie to restrain the collection of a tax upon t[illegible] sole ground of its illegality.' It then went on to sa[illegible] 'where complainant shows that in addition to th[illegible] illegality of an exaction in the guise of a tax ther[illegible] exist special and extraordinary circumstances, suf[illegible] cient to bring the case within some acknowledg[illegible] head of equity jurisprudence, a suit may be main[illegible] tained to enjoin the collector.'

"Hence in order to affirm the order of the Distri[illegible] Court we must conclude that the tax is not on[illegible] 'illegal' but that 'special and extraordinary circum[illegible] stances' also here exist creating a situation warran[illegible] ing the enjoining of the jeopardy assessment."

Homan challenges the steps taken by the government t[illegible] collect income, declared value excess profit and exce[illegible] profits taxes from Homan, which during the taxable yea[illegible] was a candy manufacturing corporation. It does no[illegible] assert that, as to Homan, these taxes are illegal becau[illegible] not applicable to such a business, or for any other reaso[illegible] As to the taxpayer involved in *Miller* v. *Standard N[illegible] Margarine Co.*, 284 U.S. 498, the tax attempted to be co[illegible] lected was illegal. There is no contention in the case[illegible] bar that the tax attempted to be collected from Homa[illegible] is illegal. That the arguments made by Homan attac[illegible] the steps taken to collect taxes, the legality of which [illegible] not even questioned, appears from its brief in this cou[illegible] Thus, Homan says that the assessment is arbitrary, capr[illegible] cious and void. It admits that its "case is bottomed o[illegible] the proposition that the assessment is so arbitrary an[illegible] capricious that it is illegal." In addition, Homan say[illegible] "We believe the facts reasonably show that the asses[illegible] ment was deliberately put at this fantastic and insuppor[illegible] able figure simply so that Homan couldn't pay it, th[illegible] creating the *appearance* of jeopardy, * * *".

Inasmuch as we conclude that Homan's complaint[illegible]

not based upon a charge that the director is attempting to collect an illegal tax, within the meaning of *Miller* v. *Standard Nut Margarine Co.*, *supra*. Homan cannot prevail. It is unnecessary for us to decide whether Homan has not shown (as contended by the Director) that there is present the additional necessary ingredient, *i.e.*, special or extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence. *Miller* v. *Standard Nut Margarine Co.*, *supra*, 509.

For these reasons, the decree entered by the district court on March 24, 1958 is reversed.

REVERSED.

DUFFY, *Chief Judge*, CONCURRING. I am fully convinced that the levying of the jeopardy assessment herein totaling more than $3,000,000.00 was arbitrary and capricious. After extended investigation and lengthy audits, agents representing the Treasury Department testified in the criminal case that Homan[1] owed less than $300,000.00 for income taxes, interest and penalties. When a number of taxpayer's deposits were found in various savings and loan associations, the amount claimed to be owing was quickly raised to $3,000,000.00. I think taxpayer's counsel draws a reasonable inference when he says the assessment was deliberately put at this fantastic and insupportable figure simply so that Homan couldn't pay it, thus creating the appearance of jeopardy.

Taxpayer claims the arbitrary and capricious assessment in itself makes the tax illegal. We held to the contrary when this case was here before. *Homan Mfg. Co., Inc.* v. *Long*, 242 F. 2d 645. We quoted from *Miller* v. *Standard Nut Margarine Co.*, 284 U.S. 498, to the effect that there must in addition exist special and extraordinary facts and circumstances to bring the case within

1 Formerly The Shotwell Manufacturing Company.

some acknowledged head of equity jurisprudence. Later decisions of this Court are in accord. *Mensik* v. *Long*, 261 F. 2d 45; *Melvin Building Corp. v. Long*, F. 2d

In deference to those decisions which have established the view of this Court, I concur in the result reached by the majority opinion herein.

It is said in the majority opinion that when this case was here before, we did not decide the question of jurisdiction. The point was squarely raised on that appeal. This Court said, 242 F. 2d at 648: "Normally jurisdictional questions demand primary attention. But under the circumstances of this case we think it advisable to first examine the jeopardy assessment phase" (Emphasis supplied). Again, on page 651 we said: "While a jurisdictional challenge meets us at the outset it can be resolved only by determining whether plaintiff's case qualifies for relief under some head of equity jurisdiction."

I agree that there is no express statement in our previous opinion that we were deciding the question of jurisdiction. But surely the members of that panel expected there would be a trial on the merits which should only have been held if the District Court had jurisdiction. We specifically held that summary judgment was improvidently granted. We also advised the District Court, page 650: "We also think the district court should consider the question of parties in light of § 6861 (g), since a government official has power to abate the assessment even after the levy has been made." Surely the District Court was fully justified in proceeding with the trial on the merits, thinking that it was carrying out the mandate of this Court.

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT,
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION.

HOMAN MFG. CO., INC., a corporation, *Plaintiff.*
— v. —
H. ALAN LONG, *et al.*, *Defendants.*
No 55 C 1541

FINDINGS OF FACT.

Trial of this action having been temporarily postponed and continued pending a discovery application under Rule 34 by the plaintiff; and the Court having heretofore entered its order of February 19, 1958, directing the production of specified documents commencing at 10:00 A. M. on February 21, 1958; and the defendant, H. Alan Long, by his attorneys, having announced that he will not comply with the said order; and the attorney for the United States who appeared herein for the United States in the Court of Appeals having announced the same position; and the Court having continued the matter for thirty days on the affidavit of H. Allan Long, sworn to on February 21, 1958, that the material requested was, on said date, "largely not in [his] physical possession" and that "some of it" was on said date "in the physical possession of the Department of Justice," which affidavit averred that it would take considerable time to assemble the material and to decide whether any or all of it could be released without

prejudice to the Government and with the consent of the Secretary of the Treasury; and the matter having come on to be further heard on March 21, 1958, at the request of Frederick G. Rita, Attorney for the Department of Justice, and Mr. Rita on said date having stated and represented to the Court that all of the material covered by the said order to produce was, on March 21, 1958, in the possession, custody and control of the Attorney General of the United States and Charles McNelis, Special Assistant Attorney General, having represented to the Court that from time to time from February 7, 1958, until a few days prior to March 21, 1958, conferences of sundry officials of the Department of Justice and of the Internal Revenue Service, including representatives of the Commissioner of Internal Revenue were held in Washington, D. C. as to whether to produce all or any of the requested material, and having represented to the Court that on March 21, 1958, all of the material ordered to be produced was in the possession, custody and control of the Attorney General pursuant to orders of the Attorney General, and Mr. Rita and Mr. McNelis having stated and represented that the Attorney General declined to produce any of the said material on the sole ground that all of it was governmentally privileged; and the Court having considered the entire record herein, including evidence heretofore received on the summary judgment proceedings herein and having been fully informed in the premises and having heard argument of counsel,

DOTH FIND:

1. The defendant H. Alan Long, Director of Internal Revenue, has refused to obey a proper and lawful order under Rule 34 of the Rules of Civil Procedure, and that it is the duty of the Court to make such orders with regard to such refusal and upon the entire record as are just.

2. The documents involved contain relevant and material evidence with respect to the validity of the assessment in question, or are reasonably calculated to lead to the discovery of admissible evidence. Many of them are shown by the testimony of the witness Mammel to be admissible in evidence and clearly requisite to a full and fair determination of the facts pertaining to the assessment. Although many of the facts already are clear upon evidence thus far received, the plaintiff cannot fully and completely try its case, as it has been directed to by the Court of Appeals, nor can this Court make the detailed evidentiary inquiry it believes the Court of Appeals felt was proper, if the said documents are withheld. The sweeping claim by Executive officials that all are privileged and can be withheld from the courts is unsupported in fact or in law.

3. The refusal of Mr. Long to obey this Court's order issued under Rule 34 and his delivery of material since February 21, 1958, to the Attorney General are the culminating steps in a course of procedure by the defendants Directors of Internal Revenue herein, acting at all times with the aid and counsel of Attorneys for the United States under orders of the Attorney General, to withhold from the Court relevant, material and pertinent evidence as to the validity of the assessment in question. This procedure started with the filing of an answer purportedly in the name and by the authority of Ernest J. Sauber which in fact was not his answer, nor authorized by him, and in important respects was contrary to facts sworn to by the said Sauber.

4. It is just (a) that the Court, exercising its dignity, powers and discretion under Rule 37 and its duty to protect citizens against taxation and deprivation of property except by due process of law, find, and it hereby does find that the defendant H. Alan Long is in default herein

and that a judgment by default be entered against him and in favor of the plaintiff, the evidence that plaintiff is entitled to relief being satisfactory to the Court and the Court so finding, and (b) that insofar as detailed facts are reasonably established by a fair preponderance of the evidence heretofore received, that subsidiary findings be and hereafter are made thereon, and that the decree of the Court and such findings rest not merely upon such default but independently thereof, and concurrently therewith, upon the evidence thus far received.

5. The Court adopts and confirms both by reason of the default and independently thereof from the evidence, each and all of its findings of fact heretofore entered herein on June 14, 1956, through finding number 14, with the exception of finding number 11 of June 14, 1956, which is amended to read as follows:

> "5-11. Mammel's determinations were arbitrary, capricious and unlawful in the extreme. Such action sprang from Mammel's lack of the requisite mental capacity to make a fair, reasonable and lawful assessment. Mammel suffered a complete mental breakdown on March 19, 1953. The record shows that in 1955 he had not recovered sufficiently therefrom to competently exercise his office. Upon examination herein in February 1956 Mammel was unable to recall or to understand basic rules of taxation which he should have taken into consideration when he made the assessment of September 1955. He also was unable to recall important points developed during the criminal trial of late 1953 to which he should have applied fair and mentally competent judgment in making the 1955 assessment. Mammel did not possess or exercise requisite mental competence in making the instant assessment."

The additional findings of June 14, 1956, herein adopted are renumbered by prefixing the numeral 5 to them and are:

"5-1. The Court has jurisdiction of the parties and the subject matter.

"5-2. Homan Mfg. Co., Inc., plaintiff herein, was formerly known as 'The Shotwell Manufacturing Co.' It is one of the defendants in a certain criminal income tax case, entitled *United States of America* v. *The Shotwell Manufacturing Company, et al.*, cause No. 52 CR 143 on the dockets of this Court, hereafter in these findings and conclusions sometimes referred to as 'the criminal case'.

"5-3. The criminal case was commenced by the filing of an indictment on March 14, 1952, alleging that the net income of The Shotwell Manufacturing Company was understated in its tax returns for the calendar years 1945 and 1946 in the sum of $490,719.52, resulting in a tax deficiency of $286,607.79. Upon the trial of the criminal case, Charles J. Mammel, Revenue Agent, testified that upon the basis of all the evidence in that case the understatement of income for the years 1945 and 1946 was $453,872.40.

"5-4. On February 7, 1949 Charles J. Mammel was assigned as Revenue Agent to investigate Federal income tax returns of the plaintiff for the years 1944, 1945, and 1946, and has worked on an investigation of the plaintiff's tax returns for the said three years, and possibly others, to the exclusion of everything else from that time to this. At various times he has had as many as nine other Revenue Agents or employees of the Internal Revenue Service working under him and assisting him in his work.

"5-5. On, and for some time prior to, September 15, 1955, all of the assets of the plaintiff (except a small amount of office furniture and records and an automobile) consisted of cash in checking accounts in Chicago banks or in deposits or shares in sundry Federal Savings and Loan associations, and amounted to approximately $1,114,000. Said assets had been held in such form for some considerable time and plaintiff did not intend to secrete or hide them.

"5-6. On September 15, 1955, the Internal Revenue Service issued and served a jeopardy levy against the plaintiff and against all of the financial institutions

in which its funds were lodged asserting that the total sum of $3,172,123.65 was then due and owing the United States from the plaintiff for additional income and excess profits taxes, penalties and interest for the years 1944, 1945 and 1946, beyond those reported and paid by plaintiff. The said levy asserted that of the foregoing sum of $755,190.88 was due for taxes for the year 1945, exclusive of penalties and interest, and $281,029.72 was due for taxes for the year 1946, exclusive of penalties asserted by the said assessment was $2,306,900.05. On or about November 14, 1955, the Internal Revenue Service issued a notice of determination of income tax liability for the said three years in which it asserted deficiencies of $2,122,944.94 for alleged taxes and penalties. The difference (excluding interest) between the amount of the jeopardy assessment of September 15, 1955 and the determination of November 14, 1955 came from a recomputation of tax rates and correction of mathematical errors and not from any substantial change in asserted income forming the base for the tax.

"5-7. The said assessment and determination were based on the work and conclusions of Charles J. Mammel, and with insubstantial deviations represent his determinations of taxable income, notwithstanding the assessment itself is signed in the name of another person.

"5-8. The assessment in question is patently arbitrary, capricious and wholly void.

"5-9. In making his determination of taxable net income Mammel made no attempt to be fair to the taxpayer at any time; he proceeded on the assumption that he was only required to be fair to the taxpayer 'if I can' and did not adhere even to that standard.

"5-10. The alleged additional income determined by Mammel consists principally of (a) alleged overceiling cash 'premiums' paid by one Lubben which asserted payments were the subject matter of the criminal case; (b) approximately $964,000 gross income which it is asserted should have resulted from extra manufacture of candy which Mammel believes

should have occurred but which is not reflected on the records of the company; and (c) disallowance of sundry items of expense. In determining item (a) above Mammel both relied upon, and misconstrued, items of evidence ordered suppressed in the criminal case, relied upon altered and changed purported records of said Lubben, wholly failed to make any good faith practical judgment as to offsetting black-market expenditures, and acted essentially upon an informal determination he had made in late 1951 or early 1952 and ignored relevant facts brought to his attention between that time and September 1955 showing that at least parts of his initial determination were erroneous. In determining item (b) above Mammel was wholly imaginary and did not even purport to find whether the so-called extra production remained in inventory or was sold and admits that he had no evidence that so much as one pound of this asserted extra 4,000,000 pounds of candy was ever sold or shipped or remained in possession. In determining substantial disallowances comprising item (c) above Mammel failed to follow reasonable procedures to test the verity of plaintiff's claimed deductions but made disallowances by whim and caprice on the excuse that he 'didn't have time' between 1949 and 1955 to investigate. The arbitrary, capricious and unlawful actions in this finding described were carried into and are substantially found in the determination of November 14, 1955.

"5-12. The making of the assessment and jeopardy levy has had the effect of completely tying up, with de minimis exceptions, all of the taxpayer's assets. Unless the arbitrary assessment and levy is set aside the taxpayer will be without funds to pay the fees and taxes necessary to maintain its corporate existence. If collection upon the jeopardy levy was permitted, all of the taxpayer's assets would be seized and it would be without funds to engage lawyers, accountants or pay any other expenses necessarily incident to a legal proceeding to recover the unlawful exaction resulting from Mammel's arbitrary and capricious assessment."

"5-13. Special and extraordinary circumstances exist in this case as to make inapplicable section 7421 of the Internal Revenue Code of 1954 relating to injunctions against the assessment and collection of taxes.

"5-14. The United States has actively participated in and controlled the defense of this litigation."

6. There is no evidence in the record showing or tending to show that the Federal income tax returns of the Shotwell Manufacturing Company for the years 1944, 1945 and 1946 were fraudulently made, and there is no evidence in the record showing or tending to show any fraud whatsoever that would justify or give the Commissioner of Internal Revenue lawful power or jurisdiction to make an assessment on September 15, 1955, or to serve a notice of deficiency on or about November 14, 1955, or at any other time more than three years after the respective filings of said returns for the said tax years (except as the same periods of limitation may have been affected by the execution of any waivers of the otherwise applicable statutory time by the plaintiff), and the Court finds as a fact that the said returns were not fraudulently made.

7. By reason of the default of the defendant H. Alan Long, District Director, the Court finds each, every and all of the allegations of the complaint, as amended, have been established, and adopts the same as findings herein, and the Court further finds, for the said reason, that each, every and all of the denials of the answer herein have not been established, and that the Court will not receive further evidence purporting to establish them, and further finds that the asserted first and second "complete defense" set forth in the answer are without merit legally or factually, and

The Court Finds as Conclusions of Law:

1. That in the exercise of its discretion for the failure of the defendant Long to comply with the order for production of documents without good cause, and there being evidence satisfactory to the Court by which the plaintiff establishes its claim to relief, the Court may properly, and does hereby, enter judgment of default against the defendant Long.

2. The assessment of September 15, 1955 made against the taxpayer and the deficiency notice served on or about November 14, 1955 were made unlawfully and in violation of plaintiff's constitutional rights, and were, and are, beyond the jurisdiction of the Commissioner of Internal Revenue, and are wholly null and void.

3. The assessment of September 15, 1955, being wholly void and of no legal effect, created no lien in favor of the United States, and the United States is not a necessary party to this action.

4. Plaintiff is entitled to a permanent injunction against the enforcement of the assessment and levy of September 15, 1955, and any other proceedings or rights that might be claimed by virtue of said assessment and levy or any new assessment based on the determinations, in whole or in part, of Charles J. Mammel, or based in whole or in part upon any of the documents refused to be produced herein.

5. Section 7421 of the Internal Revenue Act of 1954 does not prevent the Court from entering an injunction under the circumstances of this case.

6. Plaintiff is entitled to judgment in its favor with a permanent injunction which will afford it effective relief against further unlawful procedures of the defendant H. Alan Long, or any successor to him, or any other official purporting to collect income, declared value excess profit or excess profit taxes from the plaintiff for the years 1944, 1945 and 1946.

DECREE.

Upon the foregoing findings of fact and conclusions of law, it is Ordered, Adjudged and Decreed:

1. H. Alan Long, his agents, servants and any successor to H. Alan Long as Director of Internal Revenue, or any other official acting or purporting to act as a revenue officer of any rank, collecting, or seeking to collect, taxes allegedly owing by Homan Mfg. Co., Inc. for the years 1944, 1945 and 1946, and all persons purporting to act under or by virtue of a certain levy and assessment for internal revenue taxes and statutory additions thereto totalling $3,172,123.65, dated September 15, 1955, and served upon the sundry defendants herein, be and hereby are permanently restrained and enjoined from receiving any funds, monies, shares or property of any kind, or taking any steps or proceedings to secure collection of the taxes, penalties and interest so assessed or purportedly assessed against Homan Mfg. Co., Inc. on September 15, 1955, and City National Bank & Trust Company of Chicago, a national banking association, Merchants National Bank in Chicago, a national banking association, Alliance Savings & Loan Association, American Savings & Loan Association, Amity Federal Savings & Loan Association, Apollo Savings and Loan Association, Austin Federal Savings & Loan Association of Chicago, Avondale Savings & Loan Association, Bell Savings & Loan Association, Belmont-Central Savings & Loan Association, Bloomington Federal Savings & Loan Association, Bohemia Federal Savings & Loan Association, Brookfield Federal Savings & Loan Association, Capitol Federal Savings & Loan Association, Capitol Savings & Loan Association, Central Federal Savings & Loan Association, Cermak Road Savings & Loan Association, Chesterfield Federal Savings & Loan Association, Chicago Heights Federal Savings &

Loan Association, Cicero Federal Savings & Loan Association, Cicero Home Savings & Loan Association, Citizens Federal Savings & Loan Association, Civic Savings and Loan Association, Clyde Savings & Loan Association, Colonial Savings & Loan Association, Columbus Savings & Loan Association, Community Savings & Loan Association, Concord Savings & Loan Association, Concordia Savings & Loan Association, Continental Savings & Loan Association, Cook County Federal Savings & Loan Association, Cragin Savings & Loan Association, Crane Savings & Loan Association, Coachella Valley Savings & Loan, Damen Savings & Loan Association, Deerfield Savings & Loan Association, District Savings & Loan Association, Elgin Federal Savings & Loan Association, Equitable Savings & Loan Association, Evanston Federal Savings & Loan Association, Fidelity Federal Savings & Loan Association, First Federal Savings & Loan of Barrington, First Federal Savings & Loan of Berwyn, First Federal Savings & Loan of Des Plaines, First Federal Savings & Loan of River Forest and Forest Park, First Federal Savings & Loan of Rockford, First Federal Savings & Loan of Springfield, First Federal Savings & Loan, First Federal Savings & Loan of Wilmette, Grunwald Savings & Loan Association, Guardian Savings & Loan Association, Guaranty Savings & Loan Association, Harvey Federal Savings & Loan Association, Hawthorne Club Savings & Loan, Hegewisch Federal Savings & Loan Association, Hemlock Savings & Loan Association, Homan Building & Loan Association, Home Federal Savings & Loan Association, Homewood Building & Loan Association, Hoyne Savings & Loan Association, Illinois Federal Savings & Loan Association, Investors Savings & Loan Association, Irving Savings & Loan Association, Joliet Federal Savings & Loan Association, Jugoslav Savings & Loan Association, Kankakee Federal Savings & Loan Association, Labe Savings & Loan Association, LaGrange Federal Savings &

Loan Association, Laramie Federal Savings & Loan Association, Lawn Savings & Loan Association, Liberty Federal Savings & Loan Association, Liberty Savings & Loan Association, Libertyville Federal Savings & Loan Association, Lombard Savings & Loan Association, Loomis Savings & Loan Association, Manning Savings & Loan Association, Marquette Park Savings & Loan Association, Morton Park Federal Savings & Loan Association, National Savings & Loan Association, National Security Savings & Loan Association, North Avenue Federal Savings & Loan Association, North Side Federal Savings & Loan Association, Northwest Federal Savings & Loan Association, Northwestern Savings & Loan Association, Oakley Federal Savings & Loan Association, Old Reliable Savings & Loan Association, Olympic Savings & Loan Association, Peoples Federal Savings & Loan Association (Chicago), Peoples Federal Savings & Loan Association (Peoria), Prospect Federal Savings & Loan Association, Public Federal Savings & Loan Association, Public Savings & Loan Association of Chicago, Republic Savings & Loan Association, Roseland Standard Savings & Loan Association, Royal Savings & Loan Association, Second Federal Savings & Loan Association, Security Federal Savings & Loan Association, A. J. Smith Federal Savings & Loan Association, Southwest Federal Savings & Loan Association, St. Paul Federal Savings & Loan Association, Standard Federal Savings & Loan Association, Sterling Federal Savings & Loan, Supreme Savings & Loan Association, Security Federal Savings & Loan of Springfield, Summit Savings & Loan Association, Talman Federal Savings & Loan, United Savings & Loan Association, Uptown Federal Savings & Loan Association, Western Federal Savings & Loan Association, Wheaton Federal Savings & Loan Association, Federal savings and loan associations, their agents, servants and employees, and all to whom notice may come, are permanently enjoined and restrained

from paying or delivering any money, shares or property of any kind owned by Homan Mfg. Co., Inc. or in which it has any claim, title or interest, to H. Alan Long or any agent of the Internal Revenue Service of the United States, for, on account of, or any purported compliance with the said assessment and notice of levy hereinbefore described.

2. H. Alan Long, his agents, servants and any successor to him as Director of Internal Revenue, or any other officer of any rank, in the Internal Revenue Service to whom notice of this injunction shall come, are permanently enjoined and restrained from making any assessment or levy against the plaintiff for alleged income, declared value excess profit and excess profit taxes for the years 1944, 1945 and 1946 based (a) in whole or in part on determinations of Charles J. Mammel, or (b) in whole or in part upon any of the documents ordered to be produced by this Court's order of February 19, 1958 and refused to be produced herein; and such persons are further enjoined from the use in any court or in any proceedings whatsoever to which plaintiff is a party and in which the purpose, or one of the purposes, is to assess or determine additional income, declared value excess profit or excess profit taxes against the plaintiff for the years 1944, 1945 and 1946, the determinations of Charles J. Mammel in such regard, or from using therein any of the material referred to in this clause (b).

3. All defendants other than H. Alan Long are dismissed.

The Court retains jurisdiction of this cause for all purposes necessary and proper for enforcement of this decree, including retention of jurisdiction to add additional defendants and to conduct supplemental proceedings, if such shall become meet and proper.

Enter:

J. Sam Perry,
Judge.

March 24, 1958.

APPENDIX C.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

No. 11782. SEPTEMBER TERM, 1956, JANUARY SESSION, 1957.

HOMAN MFG. CO., INC.,
Plaintiff-Appellee,
vs.
H. A. LONG, ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

February 4, 1957.

242 F. 2d 645.

Before FINNEGAN, LINDLEY and SWAIM, *Circuit Judges.*

FINNEGAN, *Circuit Judge.* A summary judgment obtained by plaintiff-corporate-taxpayer, Homan Manufacturing Co., Inc.,[1] against the defendant,[2] Director of Internal Revenue

1. Formerly The Shotwell Manufacturing Company, one of the defendants in the income tax prosecution (No. 52 CR 143) reviewed by our court and reported as *United States* v. *Shotwell*, 225 F. 2d 394 (7th Cir. 1955). That case is now pending in the Supreme Court, Appellate Docket Nos. 9 and 10, filed October 17, 1955. No. 9 is the government's petition for certiorari and No. 10 is the conditional cross-petition for certiorari filed by the defendants.

2. H. A. Long, District Director for the Chicago Internal Revenue District, was substituted as defendant in place of Delbert J

precipitated the latter's appeal. Plaintiff challenged the deficiency assessment underlying a Federal tax lien (68A Stat., § 6322, I. R. C. 1954, § 6322). Homan is subject to taxation and there is absent any question of statutory exclusion (68A Stat. 911, I. R. C. 1954, § 7701). In short, Homan launched a frontal attack on the assessment, involved in this appeal, for the purpose of freeing funds frozen under a notice of levy, dated September 15, 1955, served on several hundred Federal Savings & Loan Associations where plaintiff has moneys on deposit, and which contains this itemization:

Period and Type of Tax	Date of Assessment	Account No.
1944 DVEP	9/15/55	55/30/9103900
1944 EP	9/15/55	55/30/9103900
1945 DVEP	9/15/55	55/30/9103901
1945 EP	9/15/55	55/30/9103901
1946 Income	9/15/55	55/30/9103902

Luippold, on plaintiff's motion, by order of this court on November 9, 1956.

Relevant portions of the judgment entered below, against the defendant, follow:

"D. J. Luippold, his agents and servants and all persons purporting to act under or by virtue of a certain levy and assessments for internal revenue taxes and statutory additions thereto totalling $3,172,123.65, dated September 15, 1955, and served upon * * * sundry defendants * * * be and hereby are permanently restrained and enjoined from receiving any funds, monies, shares or property of any kind, or taking any steps or proceedings to secure collection of the taxes, penalties and interest so assessed or purportedly assessed against Homan Mfg. Co., Inc. * * * D. J. Luippold, his agents and servants and all persons in the Internal Revenue Service to whom notice of this injunction shall come, are permanently enjoined and restrained from making any new assessment or levy against Homan Mfg. Co., based on the determination of Charles J. Mammel, alone, as described in the Findings of Fact and Conclusions of Law. * * *"

Period	Unpaid Balance	Statutory Additions	Total
1944	$ 53,517.82	P. 26,758.91	
		I. 33,716.23	113,992.96
1944	409,084.68	P. 250,993.15	
		I. 257,723.35	917,801.18
1945	73,064.47	P. 36,532.24	
		I. 41,646.75	151,243.46
1945	682,126.51	P. 353,277.69	
		I. 388,812.11	1,424,216.31
1946	281,029.72	P. 140,514.86	
		I. 143,352.16[1]	564,869.74
		Total Amount Due	$3,172,123.65

Roughly eleven days after that notice, Homan was granted a temporary restraining order directed to Ernest J. Sauber, then District Director of Internal Revenue. A "ninety-day" letter, dated November 14, 1955, was sent to and received by the taxpayer.[3]

3. "U. S. TREASURY DEPARTMENT
Internal Revenue Service
District Director
Chicago 2, Illinois
DE 2-4500 Ex 580
Nov 14 1955

The Homan Mfg. Co. Inc.,
Formerly The Shotwell Mfg. Co.
c o Cain & Culhane, Inc.
4545 Broadway
Chicago 40, Illinois

Gentlemen:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1946, discloses a deficiency of $280,916.41 and $140,458.22 in penalty, and that the determination of your declared value excess-profits tax liability for the taxable years ended December 31, 1944 and December 31, 1945, discloses deficiencies aggregating $76,092.29 and penalties aggregating $38,046.15, and that the determination of your excess-profits tax liability for the taxable years ended December 31, 1944 and December 31, 1945, discloses deficiencies aggregating $1,013,177.74 and penalties aggregating $568,254.13, and that the deter-

By a supplemental affidavit filed in opposition to plaintiff's motion for summary judgment, it is stated, by defense counsel that: "On or about February 10, 1956, The Homan Mfg. Co., Inc., * * * filed with the Tax Court of the United States a petition for review of the assessment complained of in this action." With what has been said thus far, we clear our opinion of several technical statutory steps which might otherwise be overlooked.

This appeal lends itself to three main divisions: (I) The nature and purpose of jeopardy assessments and, (II) The unequivocal prohibitory language[4] found in § 7421 of the Internal Revenue Code of 1954, 68A Stat. 870, 26 U. S. C. A. § 7421, and (III) Allowance of plaintiff's motion for summary judgment. Normally jurisdictional

mination of your income tax liability for the taxable year ended December 31, 1945, discloses an over-assessment of $7,940.91, as shown in the statement attached. Assessment of the above-mentioned deficiencies and penalties has been made under the provisions of the internal revenue laws applicable to jeopardy assessments."

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiencies and penalties mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiencies and penalties. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday or legal holiday in the District of Columbia in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays and legal holidays are to be counted in computing the 90-day period."

4. "* * * Prohibition of Suits To Restrain Assessment Or Collection. (a) Tax.—Except as provided in sections 6212(a) and (c), and 6213(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

In its Report accompanying H.R. 8300 (A Bill to Revise the Internal Revenue Laws of the United States) the Senate Finance Committee stated: "This section [§ 7421], which is identical with that of the House bill, contains no material change in existing law, except that subsection (b) is extended to conform to the extended authority, in section 6901(a)(a), to assess transferee liability." Sen. Rep. No. 1622, 83d Cong., 2d Sess. 610 (1954).

questions demand primary attention. But under the circumstances of this case we think it advisable to first examine the jeopardy assessment phase.

I.

Under § 6201 of the I. R. C. of 1954 the Secretary of the Treasury or his delegate make the inquiries, determinations, and assessments of all taxes (including interest, additional amounts, additions to the tax, and assessable penalties) imposed by the Code and "* * * assess all taxes determined by the taxpayer or by the Secretary or his delegate as to which returns or lists are made * * *." That section is implemented by another provision, § 6204, embodying this general rule: "The Secretary or his delegate may, at any time within the period prescribed for assessment, make a supplemental assessment whenever it is ascertained that any assessment is imperfect or incomplete in any material respect." Section 6204 in the present Code contains no material change from existing law. Limitations on assessment and collection are governed by provisions (§§ 6501-6503) in Chapter 66 of the Code. Two other integral parts of the Code should also be noted: "Section 6202 * * * If the mode or time for assessment of any Internal Revenue tax (including interest, additional amounts, additions to the tax, and assessable penalties) is not otherwise provided for, the Secretary or his delegate may establish the same by regulations," and "Sec. 6203 * * * The assessment shall be made by recording the liability of the taxpayer in the office of the Secretary or his delegate in accordance with rules or regulations prescribed by the Secretary or his delegate. Upon request of the taxpayer, the Secretary or his delegate shall furnish the taxpayer a copy of the record of the assessment." In other words, in this case, by filing its return plaintiff's corporate predecessor made, as do most

taxpayers, its self-assessment. If the initial return is accepted, income tax is paid and collected on the basis of a taxpayer's own assessment, made pursuant to the relevant statutory provisions and regulations. After filing a tax return and on dispute, but before ultimate disposition there are various administrative steps and procedures within the structure of the Internal Revenue Service. But, even during the period of such administrative activity the Commissioner may invoke the statutory weapon, jeopardy assessment, for the purpose of insulating the collection of the taxes, claimed of a particular taxpayer, against loss or prejudice. See *e. g. Brown* v. *Commissioner*, 21 B. T. A. 735 (1930).

Authority for making jeopardy assessments is conferred by Congress through § 6861, I. R. C. 1954, 68A Stat. 834: "If the Secretary or his delegate believes that the *assessment or collection* of a deficiency, as defined in section 6211, *will be jeopardized by delay*, he shall, notwithstanding the provisions of section 6213(a), immediately assess such deficiency (together with all interest, additional amounts, and additions to the tax provided for by law), and notice and demand shall be made by the Secretary or his delegate for the payment thereof." (Italics supplied.) Section 6211, of the 1954 Code, set out in the marginal note[5] defines "deficiency."

While there are some statutory limitations on the time for assessments and collections, under § 6501(a)(1) and

5. "* * * Definition Of A Deficiency. (a) In General—For purposes of this title in the case of income, estate, and gift taxes, imposed by subtitles A and B, the term "deficiency" means the amount by which the tax imposed by subtitle A or B exceeds the excess of—(1) the sum of (A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus (B) the amounts previously assessed (or collected without assessment) as a deficiency, over—(2) the amount of rebates, as defined in subsection (b)(2), made." 68 A Stat. 770.

(2) no period of limitations is provided where there is a false or fraudulent return, or a willful attempt to evade tax.

Congress gave the Secretary, or his delegate, a stop-gap remedy under § 6861. Like all first aid measures it is subject to abuse or improper use. The Code does provide interim relief for a taxpayer if he is able to give a bond under § 6863[6] and, of course, a review of the assessment is available in the tax court. We are not now saying that either the bond section or tax court review are the panacea for all ills suffered when a jeopardy assessment is utilized by the government.

Senate Report No. 730 accompanying the bill (H.R. 6402) providing for abatement of jeopardy assessments, approved August 14, 1953 and now § 6861(g) contains the following cogent observations:[7]

6. "* * * Stay Of Collection Of Jeopardy Assessments. — Bond To Stay Collection.—When a jeopardy assessment has been made under section 6861 or 6862, the collection of the whole or any amount of such assessment may be stayed by filing by regulations prescribed by the Secretary or his delegate, a bond in an amount equal to the amount as to which the stay is desired, conditioned upon the payment of the amount (together with interest thereon) the collection of which is stayed, at the time at which but for the making of the jeopardy assessment, such amount would be due. Upon the filing of the bond the collection of so much of the amount assessed as is covered by the bond shall be stayed. The taxpayer shall have the right to waive such stay at any time in respect of the whole or any part of the amount covered by the bond, and if as a result of such waiver any part of the amount covered by the bond is paid, then the bond shall, at the request of the tax payer, be proportionately reduced. If any portion of the jeopardy assessment is abated, the bond shall, at the request of the taxpayer, be proportionately reduced."

7. Sen. Rep. No. 730, 83rd Cong., 1st Sess. (1953); H. R. No. 993, 83rd Cong., 1st Sess., (1953)—the Senate Report virtually repeating that of the House is in 2 U. S. Code Congressional and Administrative News 2398 to 2399 (1953).

See also: Regs. 105, Section 81.74, 1955-1; T.D. 6126, Cum. Bull. 466 (1955), 26 Code Fed. Regs. §§ 39.273, 39.273-1 (1956 Fed. Tax Regs. §§ 39.273, 39.273-1, (U. S. Code Cong. & Adm. News 1956).

"H. R. 6402 specifically authorizes the Secretary of the Treasury to abate so-called jeopardy assessments when the Secretary determines that jeopardy does not exist.

"Under existing law if the Bureau of Internal Revenue believes that ultimate collection of a tax is in danger, it may make a so-called jeopardy assessment. *This is an arbitrary assessment designed to get control of available assets of the taxpayer pending final determination of the liability, if any.* At the present time, once such an assessment has been made, *the Bureau believes that it does not have authority to revoke* the assessment even though it finds that a mistake has been made and that there is no danger of losing the tax. As a result, the Bureau has had in the past and now has cases before it in which arbitrary jeopardy assessments, *which may be greatly in excess of any tax finally found to be due, are a cause of financial embarrassment and danger to the taxpayer involved. The Bureau believes it is unable to do anything about such cases even though it agrees that there would in fact be no risk* to the revenue in following normal procedures.

"This bill simply permits the revocation of a jeopardy assessment whenever it appears *that there is in fact no danger of losing* any tax which may be due. Enactment of H. R. 6402 is recommended by the Treasury Department.

"The bill will apply only to assessments outstanding at the date of enactment and assessments thereafter made." (Emphasis ours.)

Section 6861(g) currently effective provides, *inter alia:*

"The Secretary or his delegate may abate the jeopardy assessment if he finds that jeopardy does not exist. Such abatement may *not* be made after a *decision* of the Tax Court in respect of the deficiency has been rendered or, if *no petition* is filed with the Tax Court, after expiration of the period for filing such petition." (Emphasis added.)

Neither party to the appeal now under review mentioned

§ 6861(g). Yet we think, when it is read against the candid Senate Report, it is clear that jeopardy assessments are of their nature and purpose arbitrary—if utilizing figures unaudited to the last penny is the equivalent of the word "arbitrary." Of course saddling an exempt taxpayer with a jeopardy assessment, for example, would be arbitrary. But we find nothing in the Code requiring that jeopardy assessments be based upon computations fitted together with the accuracy of Dutch tiles. The rapidity of action inherent in insulating collections against loss by *delay* hardly suggests the leisure of chartered accountants over their books and tea. Of course, there is a background history here of continuous and prolonged audits, yet that is not the sole criteria for measuring the current jeopardy assessment.

We also think the district court should consider the question of parties in light of § 6861(g), since a government official has power to abate the assessment even after the levy has been made.

There is little doubt but what a jeopardy assessment is a statutory label for the sovereign's stranglehold on a taxpayer's assets. But we are merely tracing a statutory pattern and round out our view of this aspect of the Code by pointing up §§ 7403(a) and 6322(a) and the governing foreclosure and enforcement of liens and suits against persons served with notices of levy.

II.

By his motion and answer the District Director persistently questioned the district court's jurisdiction, though recognizing that prevailing case law has, on occasion, palliated the strictures Congress enacted in § 7421. While a jurisdictional challenge meets us at the outset it can be resolved only by determining whether plaintiff's case qualifies for relief under some head of equity jurisdiction.

Precedent reflects a case to case approach in situations where courts have previously resolved issues arising under § 7421 and its antecedent enactments.[7] The section has a long pedigree; its purpose has been frequently explained.[8] When compelling factual reasons were established, in various earlier cases, federal courts have by-passed § 7421, taken jurisdiction and exercised their equity power.

Both parties in this appeal point up the decision pivot-

[7] *Allen* v. *Regents*, 304 U. S. 439 (1938) involving admission tax to stadium owned by corporate instrumentality of the State of Georgia; *Graham* v. *DuPont*, 262 U. S. 234 (1923); *Bailey* v. *George*, 259 U. S. 16 (1922); *Hill* v. *Wallace*, 259 U. S. 44 (1922) and see 257 U. S. 310 and 615 (1921) for interim orders, government virtually consented to temporary injunction; *Dodge* v. *Brady*, 240 U. S. 122 (1916); *Dodge* v. *Osborn*, 240 U. S. 118 (1916); *Rampton* v. *Fox*, 235 F. 2d 883 (10th Cir. 1956) relief refused; *Monge* v. *Smyth*, 229 F. 2d 361 (9th Cir. 1956) relief disallowed; *Jewel Shop of Abbeville, S. C.* v. *Potts*, 218 F. 2d 692 (4th Cir. 1955) no relief; *Holland* v. *Nix*, 214 F. 2d 317 (5th Cir. 1954) relief granted to transferee of transferee; *Voss* v. *Hinds*, 208 F. 2d 912 (10th Cir. 1953) no relief; *Shelton* v. *Gill*, 202 F. 503 (4th Cir. 1953) transferee liability, judgment dismissing complaint for equitable relief reversed and remanded; *Joshimura* v. *Alsup*, 167 F. 2d 104 (9th Cir. 1948) coercive and fraudulent threats to inter Japanese person of limited education and forcing him to sign statement admitting fraud on government, constituted exceptional circumstances warranting relief; *Sturgeon* v. *Schuster*, 158 F. 2d 811 (10th Cir. 1947) extraordinary circumstances absent; *Reams* v. *Vroomans-Fehn Printing Co.*, 140 F. 2d 237 (6th Cir. 1944) relief denied; *John M. Hurst & Co.* v. *Gentsch*, 133 F. 2d 247 (6th Cir. 1943) partnership sought relief claiming non-liability, reversed and remanded for consideration of complaint. *Burke* v. *Mingori*, 128 F. 2d 996 (10th Cir. 1942) opinion contains collection of cases on point; *Midwest Haulers* v. *Brady*, 128 F. 2d 496 (6th Cir. 1942) plaintiff's certificate of convenience and necessity as a common carrier jeopardized. Motion to dismiss admitted facts well pleaded, relief warranted; *Concentrate Mfg. Co.* v. *Higgins*, 90 F. 2d 439 (2nd Cir. 1937).

Communist Party U. S. A. v. *Mogsey*, 141 F. Supp. 332 (D. C. N. Y. 1956); *Sanders* v. *Andrews*, 121 F. Supp. 584 (D. C. Okl. 1954) reversed on other grounds, 225 F. 2d 29 (10 Cir. 1955); *Long* v. *Kelly*, 100 F. Supp. 235 (D. C. Ala. 1951) exceptional circumstances found; *Acklin* v. *Peoples Sav. Assn.*, 293 Fed. 392 (D. C. Ohio, 1923) exempt association, extraordinary circumstances present.

ing on inapplicability of § 7421 (formerly R. S. § 3224) to the particular facts before the court when *Miller* v. *Nut Margarine Co.*, 284 U. S. 498 (1932) was decided. That case is a singular example when "by reason of * * * special and extraordinary facts and circumstances, § 3224 [now § 7421] * * * [did] not apply." The suit leading up to the *Miller* opinion was commenced December 26, 1929. About seven years earlier another manufacturer prevailed over the Collector of Internal Revenue in a case reported as *Higgins Mfg. Co.* v. *Page*, 297 Fed. 644 (D.C.R.I. 1924). The Rhode Island District Court found that Higgins' product was not oleomargarine or taxable as such. As a result the Commissioner, with the approval of the Secretary of the Treasury, promulgated the Higgins' case as Treasury Decision 3590 "thus informing all concerned that the product was not subject to the tax." 284 U. S. 498, 505. Several other federal courts subsequently granted relief to manufacturers who sought relief against the Collector who asserted taxability of products identical to the one involved in *Higgins*. After all this litigation the Commissioner, by letter, answered an inquiry made by the Standard Nut Margarine Co., advising it that its "product would not be taxable as oleomargarine." The *Miller* background can now be described by repeating this passage from the opinion (284 U. S. 498, 505): "Relying on the decision in *Higgins Mfg. Co.* v. *Page*, 297 Fed. 644, Treasury Decision 3590, the deputy commissioner's letter to the Institute [of Margarine Manufacturers] and the injunctions * * * [Standard Nut Margarine Company] believed the product which it proposed to manufacture and sell would not be taxable as oleomargarine, and, upon receipt of * * * [Commissioner's] letter, commenced manufacture and sale of the product." Afterward the product of Standard Nut Margarine was declared taxable by the Commissioner who demanded and threatened to collect a tax on it. "The enforcement of the Oleomargarine Act

• • • would impose a tax that • • • [Standard Nut Margarine Co.] would be unable to pay, would subject it to heavy penalties and the forfeiture of its plant together with the materials and manufactured product on hand, and would destroy its business." 284 U. S. 498, 506-507. We might also point out the stronger detailed factual background of the *Miller* case, reported as *Miller* v. *Standard Nut Margarine Co. of Florida*, 49 F. 2d 79 (5th Cir. 1931) where the Court of Appeals affirmed the decree perpetually enjoining the collector. Affirming the Fifth Circuit's decision, the majority of Justices in the Supreme Court said:

> "Independently of, and in cases arising prior to, the enactment of the provision • • • which became R. S. § 3224 [now § 7421], this court in harmony with the rule generally followed in courts of equity held that *a suit will not lie to restrain the collection of a tax upon the sole ground of its* illegality. The principal reason is that, as courts are without authority to apportion or equalize taxes or to make assessments, such suits would enable those liable for taxes in some amount to delay payment or possibly to escape their lawful burden and so to interfere with and thwart the collection of revenues for the support of the government. And this court likewise recognizes the rule that, in cases where complainant shows that *in addition* to the *illegality* of an exaction in the guise of a tax *there exist special and extraordinary circumstances* sufficient to bring the case within some acknowledged head of equity jurisprudence, a suit may be maintained to enjoin the *collector* • • • (citing) • • •
>
> Section 3224 is declaratory of the principle first mentioned and is to be construed as near as may be in harmony with it and the reason upon which it rests • • • (citing) The section does not refer specifically to the rule applicable to cases involving exceptional circumstances. The general words employed are not sufficient, and it would require specific language undoubtedly disclosing that purpose, to warrant the inference that Congress intended to abrogate that salu-

tory and well established rule. This court has given effect to § 3224 in a number of cases * * * (citing). It has never held the rule to be absolute, but has repeatedly indicated that extraordinary and exceptional circumstances render its provisions inapplicable." (284 U. S. 498, 509-510; italic ours.)

For the *Miller* case principles to become operative "special and extraordinary circumstances" must combine with illegality. After all the putative taxpayer seeking relief in the *Miller* case came into the district court armed with several judicial adjudications,[9] an official letter, and Treasury Decision unanimously proclaiming non-taxability of the type of product produced by it. Relying upon that array of rulings for the prediction that its product was non-taxable under the Oleomargarine Act of August 2, 1886, 24 Stat. 209, as amended by the Act of May 9, 1902, 32 Stat. 194, the manufacturer invested capital and embarked on an enterprise—doomed to strangulation by administrative caprice, hence equitable relief was granted. The proposed tax was illegal. The *Miller* circumstances were exceptional even to the most jaundiced eye. From the Supreme Court's opinion it appears that "At the trial * * * [Standard Nut Margarine Co.] introduced oral and documentary evidence together with specimens of the product sought to be taxed."

III.

But we are reviewing a case disposed of on summary judgment. Even if the district court has power to grant equitable relief the question of the correctness in doing so by summary judgment is a threshold one. Summary judgment procedure enables district judges to nip in the bud litigation which would wilt, if the case went forward

9. On taxability of the product involved.

to a trial on the merits, because there was no genuine issue as to any material fact.[10]

To be sure the language of Rule 56(c), Fed. Rules Civil Procedure, 28 U. S. C., authorizes a judgment to be "rendered forthwith if the pleadings, depositions, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." But that is a deceptively simple statement for application in the setting of this case because depriving the defendant of trial hinges on whether "there is the slightest doubt as to the facts." *Arnstein* v. *Porter*, 154 F. 2d 464, 468 (2nd Cir. 1946); *Campana Corporation* v. *Harrison*, 135 F. 2d 334 (7th Cir. 1943).

Arguing the propriety of the summary judgment in its favor, Homan relies on a passage from our earlier decision in *Albert Dickinson Co.* v. *Mellos Peanut Co.*, 179 F. 2d 265 (7th Cir. 1950). However, there the summary judgment was reversed and the cause remanded to the district court, and Chief Judge Duffy, delivering the opinion, suggested cautious invocation of Rule 56.

To support its complaint for injunctive relief, Homan sought and obtained a deposition beginning on February 28, 1956, of the discovery witness, Charles J. Mammel. Mr. Mammel, born in 1890, currently employed as a revenue agent in the Internal Revenue Service, had commenced working for the Service on February 2, 1920. He was a government witness in the prosecution partially reviewed and reported as *United States* v. *Shotwell*, 225 F. 2d 394 (7th Cir. 1955). One of the affidavits presented on Homan's behalf referred to, and quoted from, another affidavit made

10. *Sartor* v. *Arkansas Natural Gas Corporation*, 321 U. S. 620 (1944); *Prepo Corp.* v. *Pressure Can Corp.*, 234 F. 2d 700 (7th Cir. 1956); *Warner* v. *First National Bank of Minneapolis*, 236 F. 2d 853 (8th Cir. 1956); *Preston* v. *Aetna Life Ins. Co.*, 174 F. 2d 10 (7th Cir. 1949).

by a Special Assistant to the Attorney General, filed April 6, 1953, by the government in connection with its motion for a continuance in that criminal trial. Portions of this latter affidavit relevant here follow:[11]

> "That Charles J. Mammel, CPA, age 63, is employed by the Bureau of Internal Revenue as a revenue agent and as such was assigned as chief revenue agent in the investigation of this cause.
>
> That on Sunday, March 29, 1953, at approximately 9:00 o'clock P. M., while in the presence of the affiant and while engaged in the preparation of the trial of this cause, Mr. Mammel suffered a complete physical and mental breakdown.
>
> That since that date until the date hereof Mr. Mammel has been confined to his home, in bed, and has been receiving care and treatment from a Practitioner.
>
> That on the date hereof, contrary to instructions but in view of the imminence of this case, Mr. Mammel

11. The affidavit of Homan's counsel (part of an amendment to its motion for summary judgment) is in the Appendix to Appellant's Brief, filed in the instant appeal, at pages 397 to 399. The cross-tie to the government Attorney's earlier affidavit is on page 398. The full affidavit, filed by the government, April 6, 1953, and partially quoted in our opinion, appears on pages 551-552, Transcript of Record in Nos. 11108, 11109, 11110, 11111: *United States* v. *The Shotwell Manufacturing Company*.

It was said of Mr. Mammel, when Mr. Cunningham, Assistant United States Attorney, was urging Judge Nordbye to grant the government a continuance in the criminal trial:

> "He [Mr. Mammel] has worked on the case, as I said, a great many years and he is the technician in the case. We do have the special agent or investigators of facts, but the technical matters, all those of revenue agents, it is he that has made widespread investigation, both of the various ventures that one of our principal witnesses was engaged in and he is also the one man who can testify and be of technical assistance to the Government insofar as the records of the Shotwell Manufacturing Company are concerned; and in view of his illness, it is my feeling that his absence will affect the case materially, and I feel that the Government should not go forward at this time in his absence." 2 Transcript of Record 554-555, *U. S. v. Shotwell Mfg. Co., et al.*, Nos. 11108, 11109, 11110, 11111.

attempted to return to his office but suffered a relapse, and is again confined to his home.

It is further averred that Mr. Mammel, in view of his investigative information obtained in the past four years, is an indispensable witness and his presence is necessarily for the conduct of the trial of this case."

Homan claims it was entitled to judgment below as a matter of law because the assessment of September 15, 1955 is arbitrary, capricious and violative of its right to due process. Taxpayer's reasoning underlying this critical aspect of the appeal runs roughly in this fashion. Mr. Mammel's incapacity reflected in the quoted passages, from the 1953 affidavit, is presumed to continue until the contrary has been demonstrated. Moreover, a variety of instances underscored by plaintiff's counsel, arising during the taking of Mr. Mammel's deposition, in 1956, allegedly manifest a mental state of mind inconsistent with such a contrary demonstration. Mr. Mammel's figures, according to Homan, constitute the basis of the assessment against it. But, in Homan's sights, some of the significant figures are unreliable since Mr. Mammel displayed little, if any, support for them while being interrogated in the discovery proceedings. Throughout that examination of the Agent, by Homan's counsel, the government sporadically invoked privilege as a bar to further questioning on phases of the challenged assessment. That discovery proceeding still remains uncompleted. Homan's motion for a partial release of funds blanketed by the jeopardy assessment was pending currently with the discovery proceeding of Mr. Mammel. After accumulating a lengthy series of questions propounded to and answers elicited from, the Agent, Homan in substance suggested to the district judge that enough of a demonstration had been made, cutting ground from under the assessment to permit the judge to act on either or both of the motions—for partial release of funds and summary judgment. Without ruling on the former

pleading, summary judgment was allowed on the incompleted deposition.

IV.

Granting relief despite the statutory bar mandated by § 7421 would entail exercise of the district court's general equity jurisdiction. To deviate from that clear Congressional direction could be countenanced, if at all, only by adhering to case precedent. Congress left § 7421(a) undisturbed in its sweeping revision of the Code during 1954. Assuming, without deciding, that there is enough sound case law authorizing equitable relief in the face of § 7421, we think peremptory relief through the vehicle of summary judgment was incorrect. Because if the court has equitable powers, regardless of § 7421, they are delineated by a handful of prior opinions making it necessary to determine if the Homan facts come within their ambit. For we think the judicial rubrics already inserted in § 7421 cannot wisely by multiplied.

Homan, in short, wants funds released urging that it cannot await review by the tax court of the basic assessment, coupled with its financial inability to furnish the statutory bond. Of course the tax court is the proper forum in which to contest this assessment and the only way such review could be circumvented is if the district court wields equitable powers potent enough to strike down the assessment. Proper regard for the salient principles lying behind the hierarchy of courts designated by Congress to deal with tax matters requires a cautionary mood in this case. Actually Homan bases its case on the theory that the assessment is so arbitrary and capricious that it is illegal, and for that reason warrants equitable relief. But we think an incomplete deposition, wanting in several important respects, fails to automatically obliterate the assessment so that permanent injunctive relief can flow from summary judgment.

After reading this record we think the defense actually and in good faith controverted some critical allegations made in Honan's complaint.[12] It must be remembered that § 6861 is authorized when the collection of a deficiency "will be jeopardized by delay." Exigency is the matrix of that section. The defendant's answer contains affirmative allegations related to the "delay" phase of § 6861.

It is clear that the use of a jeopardy assessment is a discretionary prerogative of the Secretary or his delegate. Under § 6861 the government official has power to act when he *believes* collection will be jeopardized by delay. His belief is justification for placing the statutory clamp on a taxpayer's assets. We think defendant's answer to the complaint, and brief, can be reduced to the following summary. Statutory assessments under the Code enjoy a

12. E. g. Allegations in the fifteenth paragraph of the complaint are:

"15. Plaintiff alleges that it is informed and believes that it owes no additional taxes for 1944, 1945 and 1946, and that the assessment of September 15, 1955, reflected in Exhibit 'B' annexed hereto, is wholly arbitrary, capricious, unjustified, and is many fold any sum heretofore suggested by Treasury Agents. Plaintiff shows the assessment of September 15, 1955 was made after the time for assessment had expired by limitation of law with the exception that if fraud be established by the Commissioner of Internal Revenue he has power to assess additional taxes beyond the usual limitations period. Plaintiff shows that fraud is never presumed and that the assessment of September 15, 1955, occurring after the running of the usual statutory period, is without *prima facie* validity and is wholly lacking in validity unless and until, if ever, after hearing and adequate showing of fraud is made."

To which defendant answered:

"15. Denies each and every allegation contained in Paragraph 15 of the complaint. Avers that the plaintiff purports to have dispersed at least $527,384.12 for alleged tax litigation expenses from 1950 through about September 15, 1955; states that if as plaintiff alleged in Paragraph 12 its assets totalled approximately $1,114,087.07 as of September 15, 1955, this sum is obviously insufficient to pay the tax liabilities for the years 1944 to 1946, inclusive, aggregating $3,172,123.65."

presumption of validity.[13] Homan as a business corporation is well within the taxability provisions of the Code and for that reason this appeal is distinguishable from *Miller* especially because, as defendant puts it: "that it [Homan] might be liable for taxes is not beyond the realm of possibility." Moreover, defendant insists there is a genuine issue of fact lurking in the case because Homan has failed in making any showing that it, in fact, owes no taxes for the calendar years in question.

A summary judgment proceeding is not a substitute for a trial, but rather a judicial search for determining whether genuine issues exist as to material facts. *Hard* v. *Sheffield Steel Corp.*, 181 F. 2d 269, 271 (8th Cir. 1950). *Dewey* v. *Clark*, 180 F. 2d 766, 772 (D. C. Cir. 1950). The lower court cannot try out factual issues on a motion for summary judgment because once such an issue is found the court's function on that aspect of the case ends. There is statutory power to make a jeopardy assessment and levy in this case. The defense responded with its statutory assessment to plaintiff's allegations. The facts playing in on or about the assessments are in issue and their presence is enough to prevent a summary judgment.

We are sending the case back without further comment on the issue or issues of fact necessitating our reversal. When litigants are to proceed again at the trial level with a cause after our review it is essential that the case arrive below without furnishing fuel to fire up preconceived notions on the fact issues that will need disposition at a

13. Various bookkeeping records, including the Assessment Certificate, of the Chicago, Illinois Collection District are attached to the affidavit in opposition to the motion for summary judgment. Harold M. Haas, Assessment officer, appears as the signatory on the Certificate which reads: "I hereby certify that I have made assessments of taxes, penalties, and interest of the above classification specified in these lists, and that the amount stated above [$3,172-123.65] is chargeable to me, subject to such correction and subsequent inquiries and determinations in respect thereto may indicate to be proper." Haas was not a witness below.

trial on the merits. All we have decided is that summary judgment for plaintiff was improvidently granted.

The decree and judgment of the District Court entered June 14, 1956, brought here for review, must be vacated and the cause remanded to that court for proceedings not inconsistent with this opinion. It is so ordered. Judgment of the District Court vacated and the cause remanded with directions.

APPENDIX D.

In the United States District Court
For the Northern District of Illinois,
Eastern Division.

The United States of America, *Plaintiff*, *vs.* The Shotwell Manufacturing Company, et al., *Defendants*.	No. 52 Cr 143.

ORDER.

This case comes before the Court on a rehearing of the suppression issue ordered by the Supreme Court in its opinion in United States *vs.* Shotwell Mfg. Co., et al., under date of December 16, 1957. The ensuing delay in disposing of this issue as ordered by the Supreme Court is due primarily to the illness of one of the defendants which required continuances of the hearing.

Mr. Vincent P. Russo, Mr. Charles A. McNelis and Mr. Donald A. Hansen, Special Attorneys, Department of Justice, Washington, D. C., appeared in behalf of the United States of America;

Mr. George B. Christensen and Mr. Neal J. McAuliffe, of Messrs. Winston, Strawn, Smith & Patterson, Chicago, Illinois, appeared in behalf of defendants Byron A. Cain and The Shotwell Manufacturing Company;

Mr. William T. Kirby, Chicago, Illinois, appeared in behalf of defendant Harold E. Sullivan.

The rehearing of the suppression issue was ordered by the Supreme Court by reason of the showing of the Government that the decision of the Court of Appeals in *United States* v. *The Shotwell Mfg. Co., et al.*, 225 F. 2d 394, in reversing the trial court upon the ground that it had failed to suppress the use of certain evidence produced by the defendants, was based upon a fraudulent record before the trial court which was attributable to the defendants' own fraud. The supplemental hearing on defendants' motion to suppress the evidence in question was submitted on the additional evidence produced at said hearing, the record at the first suppression hearing, and the entire existing record of the trial when these moving defendants were found guilty by the jury of the offenses charged in the indictment. When the Court uses the term "defendants" it refers to the named defendants other than the defendant Huebner.

The showing before the Supreme Court as to the position of the defendants on the original motion to suppress is stated in the following language, 355 U. S. 233, 237,

> "* * * The substance of that position was presented by Leon J. Busby, Shotwell's accountant, who testified at both the hearing on the motion to suppress and at the trial. He stated that the Shotwell Company in each of the years 1945 and 1946 had received substantial cash payments for black-market candy sales above O. P. A. ceiling prices; that these receipts were not recorded on Shotwell's books and were not reported in its income tax returns; that he first learned of these facts in the course of conversations with H. Stanley Graflund, Shotwell's comptroller, during a trip they took to New York early in January, 1948; that immediately upon his return to Chicago, he discussed the matter with respondents Cain and Sullivan; that he recommended disclosing the omissions to the taxing authorities; and that, at the direction of respondents, he revealed the entire affair to Ernest J. Sauber, Deputy Collector in Chicago, in a series of conferences beginning in the latter part of January 1948, at one

or more of which conferences he was accompanied by Cain. He also testified that thereafter, acting under Sauber's instructions and assurances that only a civil liability was involved, he and his staff, with the assistance of Cain, Huebner and Graflund, conducted an exhaustive investigation over a period of several months to reconstruct the Shotwell figures on the black market transactions. He said that these figures were furnished in August 1948 to a revenue agent for scrutiny.

"Sauber and Cain gave similar testimony, except that Sauber fixed Busby's first visit to him at about the middle of March 1948. Cain's explanation of Shotwell's failure to report the black-market receipts in its income tax returns was that he believed such receipts were not taxable since they were used by Shotwell to purchase black-market supplies and therefore gave rise to no profit."

The Government's position was stated by the Supreme Court in this manner, p. 239.

"In support of its motion the Government has filed with the Court the affidavits of Huebner and Graflund which they executed after the Government filed its petition for certiorari. These affidavits paint a sharply different picture of the entire affair; indeed, they flatly contradict the tale unfolded on behalf of the respondents in the District Court. More specifically: (1) Graflund swears that the first time he discussed the black-market transactions with Busby was at Busby's home in late June 1948, at which time Busby gave no indication that he had previously known of these transactions. (2) Graflund and Huebner swear that at no time prior to a meeting held in July 1948 were they ever advised or led to believe by respondents that Shotwell's black-market receipts had been disclosed to the Treasury. (3) Huebner swears that it was at this July 1948 meeting that Cain first told him that a voluntary disclosure would be made, and that Cain also gave him to understand that it had been 'agreed' that the date of the disclosure 'would be set at June 15, 1948'; (4) Graflund

and Huebner swear that prior to the middle of July 1948 no work was done by anyone to assemble records or data for the purpose of making a disclosure to the taxing authorities, and that the alleged offsetting payments for black-market supplies were in fact concocted 'out of thin air' at the July meeting; and (5) Huebner swears that in July and August 1948 he gave Cain $10,000 which Cain said he needed 'to fix t[illegible] tax difficulty we were in.'"

And in view of the newly discovered evidence as disclosed by the Government's showing, the Supreme Court made the following observation, p. 240,

> "It is obvious that the Government's new evidence casts the darkest shadow upon the truthfulness of the disclosure testimony given by or on behalf of the respondents in the District Court. If true, it indicates that what the respondents have sought to represent in the District Court, the Court of Appeals, and in this Court as a voluntary disclosure, made in a timely manner and in good faith, was instead but a further step in a conspiracy to 'fix' Shotwell's tax difficulties, possibly involving the corruption of government officials, and certainly entailing an attempt to perpetrate a fraud upon the courts. Were we to undertake to review the Court of Appeals upon a record as suspect as this, we might very well be lending ourselves to the consummation of a fraud which may already have made the Court of Appeals its unwitting victim. In those circumstances, it is imperative that the case be remanded to the District Court for a full exploration of where the truth lies before the case is allowed to proceed further. The integrity of the judicial process demands no less."

At the supplemental hearing, this Court heard the additional evidence proffered by the Government and that offered by the defendants. It is on the entire existing record, as heretofore stated, that this Court is now to determine the timeliness of the alleged voluntary disclosure and whether or not a bona fide disclosure was in fact ever made.

Necessarily, the burden of proof rests on the defendants to establish their motion. The Court is not unmindful, however, that in order to sustain a finding of fraud, the evidence must be clear and convincing. Concededly, the Court is confronted with a considerable task in attempting to ferret out the true facts from the welter of evidence in the three records and to make definitive findings on every disputed issue of fact.

Some fourteen years have elapsed since the black-market operations of Shotwell took place. No record was kept by Shotwell or any of its officials as to the premium moneys paid by Lubben and his companies during the years in question. It is conceded that thousands of dollars were paid to Shotwell by Lubben and his representatives as black-market payments on candy sold to Lubben and his companies during 1945 and 1946 without any attempt on the part of Shotwell to make any written record thereof. Consequently, it is perfectly understandable that when a witness like Huebner attempts to recount the some sixteen instances when he received substantial sums of money on behalf of Shotwell as over-ceiling payments on candy sold by that company, the amounts and circumstances as to the disposition of the money may not be too clear in his memory. However, the testimony he has given at the supplemental hearing is reasonably consistent and compatible with the testimony given by the government witnesses at the trial regarding these payments. Huebner did not take the stand at the first supplemental hearing nor during the trial; hence, his testimony as to the amounts of money received and the siphoning of these payments to various officials of the company in many instances discloses for the first time which individuals were the recipients of Lubben's payments. However, Huebner may be mistaken as to the exact amounts of money received and when the payments were made. Moreover, that Lubben may have exaggerated the

amounts of the payments that he and his confederates made to Shotwell is entirely probable. But the evidence is overwhelmingly clear that not only were substantial sums of black-market money paid to Shotwell as premium payments by Lubben during 1944, 1945 and 1946 totaling between three and four hundred thousand dollars, but also that the greater part of this so-called black-market money was appropriated by Cain, Huebner and Sullivan for their own personal use. The question of good faith does not turn on the exact amount of Lubben money Huebner, Sullivan or Cain may have received for their own personal use. That Cain personally received substantial amounts of the Lubben black-market payments and that Sullivan knew of these payments and received a certain share for his personal use, but in a lesser amount than Cain and Huebner is fully established by the record. Neither Sullivan nor Busby took the witness stand at the supplemental suppression hearing.

As stated, there are two primary questions which the Court should determine on the record now before it; first, that of the timeliness of any so-called voluntary disclosure made by Shotwell and these defendants, and second, whether or not a bona fide disclosure was made within the purview of the so-called voluntary disclosure doctrine.

It will be remembered that Busby, Shotwell's accountant, stated that he went to Sauber in January, 1948, and disclosed to him that Shotwell had failed to include as income the black-market payments received from Lubben when it made its tax returns for the years 1945 and 1946. Busby stated at the first suppression hearing that he was prompted to make the disclosure to Sauber at this time because he first learned of the Lubben-Shotwell over-ceiling transactions from Graflund when the two were together on a train coming from New York to Chicago. Graflund on several occasions prior to the supplemental suppression hearing supported Busby's statement in this regard, but on the

supplemental suppression hearing he testified that, in stating that he imparted this information to Busby in January, 1948, he was in error and that upon further consideration and reflection, he is now convinced that he did not tell Busby about the Lubben-Shotwell transactions until after Agent Krane had made a visit to the Shotwell plant on June 21, 1948. The explanation that Graflund has given as to why he has changed his mind in this regard is not too satisfactory, and my appraisal of the evidence leads me to the conclusion that it is very probable that Graflund did mention to Busby something about the black-market payments of Lubben to Shotwell when they were on the train together in January, 1948. When Agent Krane visited the Shotwell plant in June, 1948, Graflund telephoned that fact to Cain, who was in New York, and Cain became highly disturbed because Graflund had permitted Krane to inspect certain records at the Shotwell plant. Cain told Graflund that he had no business to turn over any of the records of Shotwell to an Internal Revenue agent, and criticized him severely for doing so. Krane's visit to Shotwell's plant was in connection with an investigation of the Lubben-Shotwell black-market transactions.

In any event, these circumstances prompted Graflund to get in touch with Busby at his home shortly after Krane's visit, and Graflund now testifies that it was on this occasion that he first disclosed to Busby the transactions with respect to the company's black-market dealings with Lubben. That there were two occasions when Graflund discussed this matter with Busby is entirely probable, and due to the lapse of time he now states in good faith that the first disclosure to Busby was at the time of his visit at Busby's home in June, 1948. The apparent falsity of Busby's statement that he first spoke to Sauber in January, 1948, about Shotwell's tax situation may well have caused Graflund to question the train episode as related by Busby.

Sauber testified that he was not interviewed by Busby regarding Shotwell's tax situation until March 15, 1948, or thereabouts. All the circumstances disclosed by the evidence convincingly indicate that Busby is wrong when he states that he and the Shotwell employees were working on figures for a voluntary disclosure from January, 1948, to June, 1948. The exact time that Busby made a visit to Sauber's office is difficult to pin-point, and although the Government contends that it was not made until after the visit of Agent Krane to the Shotwell plant, my view from all the evidence is that it [illegible] fair to find that Busby did visit Sauber about Shotwell's taxes some time before Krane's visit. There is testimony of one Edmund B. Horgan, a former agent with the Internal Revenue Department, who testified that at Sullivan's request on June 4, 1948, he called Sauber as to the delay in closing the Shotwell tax matter. Although it is difficult to understand why Sullivan became concerned, at that early date, over the so-called delay when no figures had as yet been presented to any revenue officials, the status of the alleged disclosure may have been unknown to Sullivan. It is reasonable to find that when Busby did visit Sauber, mention was made of Shotwell's black-market transactions and of its failure to include these receipts in its 1945 and 1946 tax returns. And it is entirely probable that Busby represented to Sauber, as told to him by Cain, that all of the black-market income was offset by premium payments which Shotwell had made for raw materials. Cain likewise may have visited Sauber with Busby prior to June 21, 1948, and the tax situation of Shotwell was discussed at these visits. It is fair to find from the evidence that Sauber informed Busby, as well as Cain, that it would not be necessary to file an amended tax return, but rather to disclose the entire black-market premium receipts and to make a computation of all the alleged offsetting premium disbursements which

Shotwell allegedly made for raw materials. And it is entirely probable that Sauber informed Cain and Busby that, if they made an honest, bona fide voluntary disclosure, there would be no criminal prosecution and that Shotwell would incur only a civil liability. However, no attempt was made by Busby or any of the officials of Shotwell to turn over to the Government any computations of the black-market receipts and alleged black-market outlays until after Krane's visit to the Shotwell plant on June 21, 1948. Cain's plans were to effect an early settlement of Shotwell's taxes before any government agents pried into the company's books and records. Now, Krane's visit was not prompted by any information imparted by Sauber to the Internal Revenue Department, and when Graflund permitted Krane to inspect some of the records during Cain's absence, then for the first time these defendants began to exert themselves in the preparation of their so-called voluntary disclosure for the Government's consideration. I do not mean to imply, however, that defendants had not attempted between January and July, 1948, to gain information as to Lubben's books and records and as to the data such records would disclose as to his contentions regarding the over-ceiling payments made to Shotwell. When Lubben began to have tax troubles, Shotwell's officials knew that their day of reckoning was not far distant.

It was not until some time in July, 1948, however, that any concerted effort was made by these defendants to make up a so-called voluntary disclosure. It is undoubtedly true that Cain, by reason of the lack of any records in Shotwell's possession, felt required to accept Lubben's figures of black-market transactions although he believed they were exaggerated. On the other hand, the alleged offsetting black-market payments made by Shotwell to wash out, so to speak, black-market receipts, were, as represented to the Supreme Court by the affidavits of Huebner and Graflund,

concocted "out of thin air." These figures were made up at a meeting in Busby's office in July, 1948, and at the Belden Strafford Hotel during that month, where Shotwell's representatives, including Cain, Huebner and Graflund, remained for some days in attempting to devise the amount of the black-market receipts to be offset by fictitious black-market disbursements in substantially the same amount.

Huebner testified at the supplemental hearing to the effect that no black-market receipts went into the so-called "corn box," which was the depositary for the moneys to be used for the purchase of raw corn, until some time after or during January, 1946. However, there is other testimony in the record which fairly indicates that the corn box may have been opened with some of Lubben's premium money during the Fall of 1945. It is not particularly important to determine on this hearing the exact period of the existence of the corn box or the exact amount of Lubben's money that was used to purchase raw corn. Suffice it to say that the evidence clearly establishes that only a relatively small percentage of the black-market payments made by Lubben to Shotwell were utilized for the purchase of raw corn, and whether the utilization of such premium money began in the Fall of 1945 or the early winter months of 1946 it is not of any great moment on this motion. When these defendants presented the so-called voluntary disclosure by way of written computations of black-market income and black-market outgo, the amounts allegedly paid for raw materials were fictitious figures selected by Cain with full knowledge that they were without verity and merely inserted in the record in order to wash out, so to speak, the black-market receipts except for some $6,000. I find, therefore, that any so-called voluntary disclosure to Sauber by Busby and Cain prior to June 21, 1948, if it be such within the purview of the voluntary disclosure

doctrine, did not precipitate the investigation of the Lubben-Shotwell transactions by Krane and that it was not until after Krane's visit to Shotwell's plant that figures were presented to the Government allegedly showing the black-market receipts of Shotwell and Shotwell's alleged premium payments for raw materials. Obviously, therefore, whatever Busby and Cain may have told Sauber prior to June 21, 1948, regarding the failure of Shotwell to file an honest tax return for the years in question, Sauber contends that they failed to inform him that, instead of being utilized to pay for raw materials, a large amount of the premium overages "stuck to the fingers" of some of the officials of the company, which according to Huebner's testimony was the vernacular Cain employed in describing the Shotwell-Lubben-transactions.

Prior to the first suppression hearing, it is apparent that Cain, Busby and Huebner had discussed the date which should be used as the time when the so-called voluntary disclosure was made to Sauber. Huebner apparently gathered from the conversation that June 15, 1948, was to be the date, in that that date would be at least a week prior to Krane's visit to Shotwell's plant. It seems evident that Huebner had not been taken into the confidence of Sauber, Cain and Busby regarding the date of disclosure as agreed upon, because after the testimony of Sauber at the first suppression hearing to the effect that he had been first visited by Cain and Busby on March 15, 1948, regarding the Shotwell tax situation, Huebner's surprise is evidenced by the remark that he made to Cain when they left the United States Court House after Sauber had testified, and when he said to Cain, "I thought the voluntary disclosure date was supposed to be June 15, 1948." Upon which Cain said to him, "Sshhh!" "There is nobody that knows anything about this. Keep quiet." Cain denies that he ever had this conversation with Huebner. My own appraisal

of the testimony leads me to the belief that Huebner is honestly relating that episode. March 15, 1948, was just an arbitrary date which was agreed upon by Cain, Busby and Sauber in that the latter would testify that it was about that date when Busby first visited him. But obviously it was much later when Sauber was informed that Shotwell was the offending taxpayer. At the first suppression hearing, Cain testified that he was in California from March 11, 1948, to April 21 or 22, 1948. Busby testified at that same hearing that he was in California from March 16 to April 10, 1948, and that he was too busy with other tax matters to have seen Sauber on March 15, 1948.

Defendants urge that if any of the black-market money paid by Lubben went into the hands of the corporate officers by way of constructive dividends, it is immaterial as to the issue of good faith; that is, they urge that whether the black-market money went to officials of Shotwell or whether it went for the purchase of corn; or if some of the money was diverted for each of such purposes, the result taxwise would be the same in view of the public-announced policy of the Internal Revenue Department, which was adhered to until 1950, to the effect that, for tax purposes, over-ceiling payments for raw materials would not wash out the over-ceiling receipts of the taxpayer. Hence, defendants argue that taxwise, in view of the Internal Revenue Department's policy, Shotwell would be required to pay a tax on all of the black-market receipts as income whether they went into the black-market payments for raw materials or whether they went into the pockets of the corporate officers. In other words, the defendants contend that Shotwell would not, under the Commissioner's ruling, have been allowed a deduction from such gross receipts under either circumstance, and hence the identity of the ultimate recipients of Lubben's money was not necessary in order to have a bona fide and good-faith voluntary

disclosure. But that reasoning is not sound and is obviously specious. If all the black-market moneys received by Shotwell had been paid out by Shotwell for over-ceiling raw materials necessary to its candy manufacture, then such disclosure would have been an honest, forthright representation of the true facts. Under such circumstances Shotwell would have a right to challenge the Commissioner's ruling as to the non-deductibility of black-market payments for raw materials, and after payment of its tax institute an action to recover the assessment imposed. However, if only a relatively small portion of the Lubben payments were expended by Shotwell for black-market raw materials and the balance diverted into the hands of the officials of the company by way of constructive dividends, then obviously the receipts by Shotwell from Lubben to the extent of such constructive dividends indisputably must be stamped as income to the company. In representing to the Government that all of the premium payments to Shotwell were expended for raw materials, these defendants made a dishonest, false and fraudulent disclosure, because such a disclosure did not conform to the true facts. The so-called voluntary disclosure was concocted for the express purpose of misleading the tax officials. It is true that the question of an honest disclosure does not, as the Court of Appeals held, necessarily turn upon the identity of the recipients of the black-market premiums paid to Shotwell; that is, the defendants were not required to disclose the names of Richard Roe or John Doe as the alleged conduits through whom corn was purchased in order to obtain the necessary supply of corn syrup for Shotwell's candy manufacture. But if the unreported income was not disbursed for over-ceiling raw materials and hence offset, but was in fact received by Cain, Huebner and Sullivan, as the record amply establishes, then admittedly material facts were not made known to the Government at

the time of the disclosure, whether such disclosure be determined as taking place during some of the preliminary conversations between Cain, Busby and Sauber prior to June 21, 1948, the date of Krane's visit to the Shotwell plant, or when the actual figures of receipts and disbursements for 1945 and 1946 of black-market income and disbursements were later, and after June 21, 1948, presented by the defendants to the Government.

The Court of Appeals in its opinion, 225 F. 2d 395, 403, found that there was no inconsistency in making a disclosure that there was no tax due, stating in referring to the defendants,

> "While they coupled a disclosure of unreported income with a *legal* suggestion that that income was not taxable because it was offset by disbursements substantially equivalent thereto for over-the-ceiling purchases of raw material, contrary to the then legal contentions of the Treasury Department, they did disclose the *facts*."

However, the record now persuasively establishes that the defendants never did disclose the true facts to the Treasury Department in that they failed to reveal that substantial amounts of the unreported income were diverted into the pockets of the officials of the company and falsely contended that substantially all of the black-market receipts were expended for over-ceiling purchases of raw materials. This is not only the Court's conclusion based upon the entire record, but it necessarily was the jury's conclusion, on the record at the trial, in that the jury was expressly instructed that, if the over-ceiling payments received by Shotwell were expended for raw materials in carrying on its candy manufacturing business, then its verdict must be one of not guilty.

There was evidence before the Court at the supplemental suppression hearing that Cain had stated to Huebner in the

Summer of 1948 that he had to have some $10,000 in order to "fix" Shotwell's tax case. Huebner testified that that sum of money was actually delivered by him to Cain for such alleged purpose. On this record, the Court cannot make a definitive finding as to whether or not any officials of the Government were actually bribed. However, I am convinced that this episode regarding the "fixing" of tax officials by Cain occurred as related by Huebner, and I also am convinced from this record that, in the Summer of 1948, Cain stated to Huebner that he had been able to settle Shotwell's tax difficulties for the sum of $20,000, whereupon Huebner was so relieved that he notified Graflund, who was on his vacation, of the good news. But Cain's plans in that regard went awry and no settlement was forthcoming. Of course, what caused the disruption of the proposed adjustment of Shotwell's tax on the basis Cain had indicated to Huebner is shrouded in some mystery. The record does disclose that Agent Lima, at his superior's direction, made a report in the Fall of 1948 designed to settle Shotwell's taxes for about $20,000. It seems improbable, however, that Agent Lima's report was to be the final adjudication of Shotwell's tax obligations, and I can only conclude on this record that some preliminary steps were taken by Lima to prepare a report which had for its purpose the settlement of Shotwell's tax deficiency in the amount indicated. Lima testified that he destroyed his report at the direction of a superior official after a meeting held in the Internal Revenue Department early in the Fall of 1948. His testimony ties in with Huebner's testimony that at about this time Busby told him that there had been a meeting in the fraud division of the Internal Revenue office about the Shotwell taxes; that papers were being destroyed and that "all hell had broken loose" in the department. The evidence in this regard strongly tends to illustrate the connivance and lack of good faith in the so-called bona fide

voluntary disclosure of Shotwell's tax deficiency. The machinations of defendant Cain in his attempt to defraud the Government permeate the entire record.

I am not unmindful that there are some glaring inconsistencies and contradictions which appear in the testimony of Huebner, Graflund and Lima in light of their prior statements and their testimony before the Grand Jury. Defendants urge that Huebner and Graflund, concerned with possible future criminal prosecution against them by the Government, and Lima, worried about his job, have wittingly or unwittingly followed the suggestions and pattern of events which zealous government officials may have attempted to inculcate. I have endeavored to make reasonable allowances for the lapse of the years which dim memories, and to give due consideration to the claim of the defendants as to the interest of the revenue officers, and perhaps others, to encourage these witnesses to follow a chronology of events and circumstances which may support the Government's contentions as to what occurred during the years in question. However, I do not believe that any government official has attempted to have any witness herein testify falsely. That there was fear on the part of Huebner, Graflund and Lima as to the retaliation of the Government in view of their complicity in the fraud perpetrated is undoubtedly true. But to suggest that all of the diverted black-market money received by Shotwell from Lubben and his companies went to Huebner and that none of it was pocketed by Cain or Sullivan is simply incredible in light of the evidence. If these three witnesses, Huebner, Graflund and Lima, had not engaged in any questionable transactions in connection with Shotwell's tax problems, there would have been no occasion for them to fear government prosecution and to offer themselves as witnesses for the Government. There is no sound basis for the suggestion that they are trying to frame Cain and Sullivan. Huebner

and Graflund were not the men in charge of Shotwell's operations; they carried on their duties at the beck and call of their superiors. Cain was the head of that institution and Sullivan came next in authority. In his testimony at the first suppression hearing, Cain stated that Huebner and Graflund were men of the highest integrity. The candid and self-incriminating admissions of Huebner that he received such substantial sums from the Lubben black-market payments and obtained therefrom some $45,000 for his own use, not only tends to corroborate Lubben's testimony, but also lends credence to the Government's position that he is trying to the best of his ability to tell an honest and straight-forward story as to the events that took place regardless of his own entanglement in this tax fraud. Errors or inconsistencies in Huebner's testimony do not, as defendants contend, discredit his entire testimony. The forthright attitude of government counsel to submit all prior statements and Grand Jury testimony of Huebner and Graflund to defendants' counsel indicates a commendable frankness in affording the Court all of the background which may bear upon their veracity.

Graflund never received one cent of Lubben's money for his own personal use. Whatever he did in connection with Shotwell's black-market transactions or in furtherance of any scheme to defraud the Government with respect to the alleged voluntary disclosure was dictated or suggested by his superiors. Regardless of the disagreements between his present testimony and his prior statements and Grand Jury evidence, I believe Graflund is attempting now to tell the truth as he remembers the events after the lapse of these many years.

On this record, in view of the convincing evidence, there must be a finding, and I do so find, that fraud permeated the showing made by these defendants before me at the original suppression hearing, as well as at the trial and the

supplemental hearing, and I find that no honest, bona fide voluntary disclosure to any government official ever was made by Shotwell or these defendants with respect to Shotwell's 1945 and 1946 taxes as contemplated by the voluntary disclosure policy in existence at the time. A dishonest and false disclosure cannot be held to be a timely voluntary disclosure.

The above may be considered as the Court's findings of fact, and as conclusions of law I find that defendants' motion to suppress must be, and the same hereby is, in all things denied. It is so ordered. Exceptions are reserved.

Dated this 15th day of April, 1959.

INDEX

	Page
Opinion below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	3
Argument	5
Conclusion	11

CITATIONS

Cases:	
Brasier v. *United States*, 229 F. 2d 176, certiorari denied, 351 U.S. 925	6, 8
Brown-Wheeler Co. v. *Commissioner*, 21 B.T.A. 755	7
Burke v. *Mingori*, 128 F. 2d 996, certiorari denied, sub nom. *Mingori* v. *Broderick*, 317 U.S. 662	6, 7, 8
Communist Party, U.S.A. v. *Moysey*, 141 F. Supp. 332	7, 10
Darnell v. *Tomlinson*, 220 F. 2d 894	6, 7, 8
Dyer v. *Gallagher*, 203 F. 2d 477	6, 10
Foundation Co. v. *United States*, 15 F. Supp. 229	7
Harvey v. *Early*, 66 F. Supp. 761, affirmed, 160 F. 2d 836	10
Helvering v. *Taylor*, 293 U.S. 507	9
Holdeen v. *Ratterree*, 253 F. 2d 428, affirming, 155 F. Supp. 509	6, 7, 8
Jewel Shop of Abbeville, S.C. v. *Pitts*, 218 F. 2d 692	6, 7, 8
Lloyd v. *Patterson*, 242 F. 2d 742	7, 9
Mensik v. *Long*, 261 F. 2d 45	5, 8
Midwest Haulers, Inc. v. *Brady*, 128 F. 2d 496	10
Miller v. *Standard Nut Margarine Co.*, 284 U.S. 498	5, 6, 8
Milliken v. *Gill*, 211 F. 2d 869	5, 8
Monge v. *Smyth*, 229 F. 2d 361	5
National Foundry Co. of N.Y. v. *Director*, 229 F. 2d 149	10
O'Connor v. *United States*, 203 F. 2d 301	9
Phillips v. *Commissioner*, 283 U.S. 589	10

Cases—Continued Page
Publishers New Press v. *Moysey*, 141 Supp. 340 ..... 6, 7, 8
Reams v. *Vrooman-Fehn Printing Co.*, 140 F. 2d 237 .. 6
Shelton v. *Gill*, 202 F. 2d 503 10
Smith v. *Flinn*, 261 F. 2d 781 10
State Railroad Tax Cases, 92 U.S. 575 5
United States v. *Brodson*, 241 F. 2d 107 9
United States v. *Curd*, 257 F. 2d 347, certiorari denied, 358 U.S. 920 8
Yoke v. *Mazzello*, 202 F. 2d 508 10
Yoshimura v. *Alsup*, 167 F. 2d 104 10
Constitution of the United States:
Fifth Amendment 10
Statutes:
Internal Revenue Code of 1939:
Sec. 273(a) (26 U.S.C. 1952 ed., Sec. 273(a)) 2, 7
Sec. 273(b) (26 U.S.C. 1952 ed., Sec. 273(b)) 2
Internal Revenue Code of 1954, Sec. 7421(a) (26 U.S.C. 1952 ed., Supp. II, Sec. 7421(a)) 2, 3, 5
Miscellaneous:
Federal Rules of Civil Procedure, Rule 34 4
S. Rep. No. 52, 69th Cong., 1st Sess., pp. 26–27 (1939–1 Cum. Bull. (Part 2) 332, 352) 7

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 188

HOMAN MFG. CO., INC., AN ILLINOIS CORPORATION, PETITIONER

v.

HAROLD R. ALL, DISTRICT DIRECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. A) is reported in 264 F. 2d 158. The District Court wrote no opinion, and its findings of fact and conclusions of law (R. 104–113)[1] are not officially reported.

[1] Record references are to the separate "Appendix B to Appellant's Brief" filed with the Court of Appeals on the second appeal of this case. References to the supplemental record are to the separate "Appendix to Appellant's Brief" filed with the Court of Appeals on the first appeal of this case.

JURISDICTION

The judgment of the Court of Appeals was entered on February 17, 1959, and the court denied a petition for rehearing on April 10, 1959. The petition for a writ of certiorari was filed on July 7, 1959. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals correctly held that Section 7421 of the Internal Revenue Code of 1954 prohibits the maintenance of a suit brought by a corporate taxpayer to restrain the collection of income and excess profits taxes under a jeopardy assessment, where the taxpayer is subject to such taxes, has ceased doing business, has liquidated its assets, and will eventually be able to litigate the amount of its tax liability in the Tax Court.

STATUTES INVOLVED

Internal Revenue Code of 1939:

> SEC. 273. JEOPARDY ASSESSMENTS.
>
> (a) *Authority for Making.*—If the Commissioner believes that the assessment or collection of a deficiency will be jeopardized by delay, he shall immediately assess such deficiency (together with all interest, additional amounts, or additions to the tax provided for by law) and notice and demand shall be made by the collector for the payment thereof.
>
> (b) *Deficiency Letters.*—If the jeopardy assessment is made before any notice in respect of the tax to which the jeopardy assessment relates has been mailed under section 272(a).

then the Commissioner shall mail a notice under such subsection within sixty days after the making of the assessment.

* * * * *

(26 U.S.C. 1952 ed., Sec. 273.)

Internal Revenue Code of 1954:

SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) *Tax.*—Except as provided in sections 6212 (a) and (c), and 6213(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

* * * * *

(26 U.S.C. 1952 ed., Supp. II, Sec. 7421.)

STATEMENT

This is a suit brought by a corporate taxpayer to enjoin the District Director from collecting income and excess profits taxes under a jeopardy assessment.

In 1952, the taxpayer ceased doing business and liquidated almost all of its assets. Since January 1953, its only place of business has been a small office in Chicago maintained for the settlement of its affairs. (Supp. R. 21.) In 1952, criminal proceedings for tax evasion were instituted against it and three of its principal officers. These proceedings are still pending. (See Pet. App. D.) On September 15, 1955, a jeopardy assessment totalling approximately $3,172,000 was made against the taxpayer for the taxable years 1944–1946. A deficiency notice was mailed on November 14, 1955, and on February 10, 1956, the taxpayer petitioned the Tax Court for a

redetermination of the deficiency. (See Pet. App. C, pp. 21–23.) No further action has been taken in the Tax Court proceedings which are still pending.

Shortly before petitioning the Tax Court, taxpayer commenced the present suit by filing a complaint in the District Court (Supp. R. 13–35) seeking to enjoin collection of the tax under the jeopardy assessment. The District Court granted the taxpayer's motion for summary judgment and entered a permanent injunction. (Supp. R. 416–420.) In vacating this decree, the Court of Appeals considered at length the jurisdictional barriers to the taxpayer's suit, but postponed a decision on that issue by deciding that, in any event, summary judgment had been improvidently granted. (Pet. App. C.)

Following a remand to the District Court, taxpayer moved under Rule 34 of the Federal Rules of Civil Procedure for the production of all documents, reports, and memoranda in the Government's possession having anything to do with the assessment against it. Included in the taxpayer's motion was a request for copies of everything written by the special agent who investigated the criminal case, and a request for the transcript of certain conferences referred to by the Solicitor General in his petition for certiorari in the criminal case. (R. 28–32.) The District Court granted the motion for production (R. 59–64), and when the District Director declined to produce the material on the ground that it was privileged (R. 82), the District Court found, as a fact, that no tax was due for the years 1944–1946 and that the taxpayer's returns for those years were

not fraudulent (R. 104, 112; Supp. R. 24; Pet. App. A., pp. 2–3). The court thereupon entered an order permanently enjoining the District Director and all other revenue officers from taking any steps to collect the assessed taxes, penalties, and interest, or from using any of the material covered by the production order in any court proceeding involving a determination of the taxpayer's tax liability for the years 1944–1946. (R. 114–118.)

In reversing the District Court's order, the Court of Appeals squarely held that Section 7421 of the 1954 Code is a jurisdictional bar to the maintenance of the taxpayer's suit. (Pet. App. A.)

ARGUMENT

The decision below is correct, not only for the reasons given by the Court of Appeals, but also on alternative grounds which that court found unnecessary to consider. There is no conflict of decisions or other reason warranting review by this Court.

1. By virtue of the statutory provisions now appearing in Section 7421 of the Internal Revenue Code of 1954, *supra*, p. 3, no court may enjoin the assessment or collection of federal taxes absent a showing of (1) the illegality of the tax involved, and (2) the presence of special and extraordinary circumstances sufficient to bring the case within an acknowledged head of equity jurisdiction. *Miller* v. *Standard Nut Margarine Co.*, 284 U.S. 498, 509; *State Railroad Tax Cases*, 92 U.S. 575, 613–614; *Mensik* v. *Long*, 261 F. 2d 45, 47 (C.A. 7); *Monge* v. *Smyth*, 229 F. 2d 361, 366 (C.A. 9); *Milliken* v. *Gill*, 211 F. 2d 869 (C.A. 4);

Dyer v. *Gallagher*, 203 F. 2d 477 (C.A. 6); *Brasier* v. *United States*, 229 F. 2d 176, 177 (C.A. 10), certiorari denied, 351 U.S. 925.

In the light of these established conditions precedent to injunctive relief, the decision below is clearly correct. As the Court of Appeals noted (Pet. App. A, pp. 3–5), the first prerequisite is lacking because the taxes in question are not "illegal". The taxpayer has never claimed, nor could it demonstrate, that it is not subject to income and excess profits tax. It challenges only the *amount* of the actual assessment. However, it is clear that the statutory bar to injunction suits cannot be lifted simply because there is a dispute about the amount of tax owed by a taxpayer admittedly subject to tax. *Jewel Shop of Abbeville, S.C.* v. *Pitts*, 218 F. 2d 692, 694 (C.A. 4th); *Holdeen* v. *Ratterree*, 253 F. 2d 428 (C.A. 2), affirming 155 F. Supp. 509, 510 (N.D.N.Y.); *Darnell* v. *Tomlinson*, 220 F. 2d 894, 896, fn. 6 (C.A. 5); *Reams* v. *Vrooman-Fehn Printing Co.*, 140 F. 2d 237, 240 (C.A. 6); *Publishers New Press* v. *Moysey*, 141 F. Supp. 340, 343 (S.D.N.Y.). The illegality required for injunctive relief arises where a tax is levied against a taxpayer who is not subject to the tax; it is not present simply because the amount of an assessment may exceed the amount of the taxpayer's actual liability when it is ultimately determined. Cf. *Miller* v. *Standard Nut Margarine Co., supra;* with *Burke* v. *Mingori*, 128 F. 2d 996, 997 (C.A. 10), certiorari denied, *sub nom. Mingori* v. *Broderick*, 317 U.S. 662.

Accordingly, the taxpayer's contention (Pet. 8, 14-16, 25–26) that the amount of the assessment here in-

volved was deliberately set at an excessive figure in order to create the appearance of jeopardy—even if assumed, *arguendo*, to be true[2]—does not afford a basis for injunctive relief. Whether the taxpayer's assertions be viewed as an attack on the District Director's belief regarding the existence of jeopardy (Pet. 8, 29), or as an attack on the amount of the assessment (Pet. 8, 15, 26), it is well settled that neither question can be litigated in a suit to enjoin collection of the tax. The taxpayer does not dispute the fact that the Director made the assessment after consultation with his assistants in the normal course of his duties; and in such a situation the courts have uniformly held that the Director's belief as to the existence of the jeopardy is not subject to judicial review. *Lloyd* v. *Patterson*, 242 F. 2d 742, 743–744 (C.A. 5); *Foundation Co.* v. *United States*, 15 F. Supp. 229, 246–247 (C. Cls.); *Brown-Wheeler Co.* v. *Commissioner*, 21 B.T.A. 755, 756–757; *Communist Party, U.S.A.* v. *Moysey*, 141 F. Supp. 332, 336 (S.D.N.Y.). See Section 273(a) of the Internal Revenue Code of 1939, *supra*, p. 2, and S. Rep.

[2] Contrary to taxpayer's suggestion (Pet. 26, fn. 6), we have never conceded that the assessment in question was capriciously and irrationally set at an excessive figure, and we deny the accusation (Pet. 27, fn. 6) that documents in the Government's possession were not produced because they would have shown that the assessment was "illegal". We have refrained from introducing facts to show the amount of the taxpayer's liability because it is our position that a dispute about the amount of liability does not and cannot confer jurisdiction on the District Court to enjoin collection of the assessed tax. *Burke* v. *Mignori*, *supra*; *Jewel Shop of Abbeville, S.C.* v. *Pitts*, *supra*; *Darnell* v. *Tomlinson*, *supra*; *Holdeen* v. *Ratterree*, *supra*; *Publishers New Press* v. *Moysey*, *supra*.

No. 52, 69th Cong., 1st Sess., pp. 26–27 (1939–1 Cum. Bull. (Part 2) 332, 352). And, as noted above, it is equally well established that the amount of a taxpayer's liability may not be litigated in a suit for injunctive relief. *Publishers New Press* v. *Moysey, supra; Jewel Shop of Abbeville, S.C.* v. *Pitts, supra; Holdeen* v. *Ratterree, supra; Darnell* v. *Tomlinson, supra; Burke* v. *Mignori, supra.* That question can properly be resolved in the pending Tax Court case, but not in proceedings arising out of a suit to enjoin collection.[3]

2. Even if the tax here involved were illegal, which we deny, the result reached by the Court of Appeals would be correct. As previously indicated, jurisdiction to enjoin the collection of a tax exists only if two factors are present. Proof that the tax is illegal is not enough. It must also be shown that special and extraordinary circumstances exist which bring the case within a recognized head of equity jurisdiction. *Miller* v. *Standard Nut Margarine Co., supra; United States* v. *Curd*, 257 F. 2d 347, 350–351 (C.A. 5), certiorari denied, 358 U.S. 920; *Mensik* v. *Long, supra; Milliken* v. *Gill, supra; Brasier* v. *United States, supra.* No such circumstances are present here. It was not until after the taxpayer had ceased doing business and liquidated its assets that

[3] Nor is it appropriate in such proceedings to consider taxpayer's charges with respect to the pending criminal proceedings. While we disagree with the taxpayer's analysis of the latest criminal hearing (Pet. 2–3), and deny the taxpayer's resulting accusations (Pet. 3–5, fn. 2), these are clearly matters to be raised only in appellate proceedings for review of Judge Nordbye's decision in the criminal case. For present purposes, a mere reading of Judge Nordbye's opinion (Pet. App.

the jeopardy assessment was made. (Supp. R. 21.) Consequently, there is not now and never has been any threat that collection of the jeopardy assessment would destroy or harm a going business concern. Furthermore, the assertion (Pet. 29; Supp. R. 25–26) that collection of the jeopardy assessment would render the taxpayer unable to pay for the preparation and defense of related civil and criminal proceedings is irrelevant. It is well established that the theoretical possibility of such a contingency affords no basis for enjoining the enforcement of a jeopardy assessment. *Lloyd* v. *Patterson,* 242 F. 2d 742, 744 (C.A. 5); *O'Connor* v. *United States,* 203 F. 2d 301, 303 (C.A. 4). See also *United States* v. *Brodson,* 241 F. 2d 107, 109 (C.A. 7). Moreover, petitioner's chief officers, Byron H. Cain and Harold E. Sullivan, are co-defendants in the criminal case, and petitioner's defense is necessarily bound up with theirs. Patently, therefore, the allegations in the taxpaper's complaint relating to alleged special circumstances (Supp. R. 24–26) are insufficient to confer jurisdiction on a District Court in a suit to enjoin the collec-

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D., pp. 40–57) is a sufficient answer to the allegations of petitioner's fn. 2.

On August 6, 1959, the defendants in the criminal case (*United States of America* v. *The Shotwell Manufacturing Company,* No. 1, Oct. Term, 1957) filed motions with this Court to (1) vacate orders of this Court dated December 16, 1957, granting certiorari, vacating judgment of the Court of Appeals, and remanding the case to the District Court, and (2) to enter new orders denying the government's petition for certiorari and directing the District Court to vacate the sentences imposed upon the Shotwell Manufacturing Company, Byron A. Cain, and Harold E. Sullivan, on May 22, 1959.

tion of taxes, and while the Court of Appeals found it unnecessary to consider this aspect of the case (Pet. App. A, p. 5), the total absence of any special or extraordinary circumstances provides independent support for the result which the court reached when it dismissed the suit for lack of jurisdiction.

3. There is no conflict. The asserted conflict (Pet. 17–18, 25–26) with the decision of this Court in *Helvering* v. *Taylor*, 293 U.S. 507, is clearly nonexistent. There the Court was dealing with the standards to be applied in determining the amount of tax liability in Tax Court proceedings, not the standards to be applied in determining whether jurisdiction exists to enjoin collection of the tax. The remaining decisions relied on by the taxpayer (Pet. 19–22) are all clearly distinguishable on their facts and present no conflict of law.[4]

4. There is no merit in the taxpayer's suggestion (Pet. 6, 8–9, 26–30) that enforcement of the jeopardy assessment pursuant to the decision of the Court of

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[4] Thus, where it was clear as a matter of law, or was alleged in the complaint, that the plaintiffs could not possibly be held accountable for certain assessed taxes or penalties, and where it was also clear that collection would utterly destroy or seriously harm a going business, collection was enjoined in *Shelton* v. *Gill*, 202 F. 2d 503 (C.A. 4); *National Foundry Co. of N.Y.* v. *Director*, 229 F. 2d 149 (C.A. 2); and *Midwest Haulers, Inc.* v. *Brady*, 128 F. 2d 496 (C.A. 6). Injunctive relief was granted in *Smith* v. *Flinn*, 261 F. 2d 781 (C.A. 8), and *Yoke* v. *Mazzella*, 202 F. 2d 508 (C.A. 4), because the taxing authorities had failed to comply with express statutory provisions enacted for the protection of the taxpayer, and in *Yoshimura* v. *Alsup*, 167 F. 2d 104 (C.A. 9), the court enjoined collection where revenue agents had used coercive threats and fraud to obtain the taxpayer's consent to assessment.

Appeals would constitute a denial of due process. This Court and other courts have uniformly held that, because adequate legal provision is made for ultimate judicial determination of tax liability, collection of a jeopardy assessment does not violate the due process clause of the Fifth Amendment. *Phillips* v. *Commissioner*, 283 U.S. 589, 595–597, and fn. 6; *Dyer* v. *Gallagher*, 203 F. 2d 477, 478–479 (C.A. 6); *Harvey* v. *Early*, 66 F. Supp. 761, 763–764 (W.D. Va.), affirmed, 160 F. 2d 836, 838 (C.A. 4); *Communist Party, U.S.A.* v. *Moyse*y, 141 F. Supp. 332, 339 (S.D.N.Y.). As noted above, the taxpayer will be able to litigate the issue of its tax liability in the proceedings now pending in the Tax Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 188

HOMAN MFG. CO., INC., AN ILLINOIS CORPORATION,
Petitioner,

vs.

HAROLD R. ALL, DISTRICT DIRECTOR OF INTERNAL REVENUE,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Respondent's brief in opposition to certiorari is largely an effort to evade the question. It is a studied attempt to portray the case as merely one in which the petitioner recognizes that a valid assessment has been made and is attempting only to contest its "amount." That is not this case at all. Petitioner comes to this Court with undisturbed findings of fact (Pet. App. p. 7 *et seq.*) by the District Court, based upon admissions of the Revenue Agent who built the so-called assessment, that it was not a good faith valuation of tax liability but a deliberate over-assessment and hence, we submit as the District Court found, wholly illegal.

Without exception, the cases relied upon by respondent are cases in which the taxpayer was seeking relief solely on the ground of hardship and presented no question as

to the regularity and validity of the assessment. Such cases have no relevance to this proceeding in which petitioner has obtained binding findings of fact not that the assessment was merely incorrect as to amount, but that it was grounded upon no rational basis and was deliberately put at a fantastically excessive amount for the purpose, and with the intention, of completely destroying petitioner and its ability further to contest either the criminal or civil liability asserted against it (Pet. App. pp. 10-12).

On the other hand, the cases cited by petitioner (Pet. p. 28) show beyond any question of doubt that it is an established principle of law that an assessment which is "so grossly out of proportion * * * as to show that the assessor could not have been honest" or "is purposely made too high through prejudice or a reckless disregard of duty in opposition to what must necessarily be the judgment of all competent persons" is a fraudulent assessment which "amounts to no assessment at all." In *Hill* v. *Wallace* (1922), 259 U. S. 44, 68, 42 S. Ct. 453, this Court said that a taxing statute which imposes a tax for improper purposes "cannot be sustained as an exercise of the taxing power of Congress conferred by § 8, Article I" of the Constitution—the same necessarily is true of an assessment because it cannot be that Congress is bound by the Constitution but minor civil servants are not (See *Yoshimura* v. *Alsup*, quoted below).

Respondent's contention that it is immaterial whether the officials of Internal Revenue Service acted in good faith in making this fantastic assessment, so long as the statute imposing the income tax and vesting in them powers of administration is valid, is squarely refuted by decision of the Court of Appeals for the Ninth Circuit in *Yoshimura* v. *Alsup* (1948), 167 F. 2d 104. In that case the Court said that (at p. 106):

> "We can see no difference in a coercion by statute and such coercion by the statutory officers for the enforcement of the tax laws. This is 'the unusual, the extraordinary case' referred to in our opinion in *Matcovich* v. *Nickell*, 9 Cir., 134 F. 2d 837, 838; the 'gross and indisputable oppression' of *Concentrate Mfg. Co.* v. *Higgins*, 2 Cir., 90 F. 2d 439, 441; and the 'arbitrary and capricious conduct' of *Burke* v. *Mingori*, 10 Cir., 128 F. 2d 996, 997 and of *Jacoby* v. *Hoey*, 2 Cir., 86 F. 2d 108, 109."

Respondent's attempt to assert that the income tax law vests in administrative officers of the Internal Revenue Service unlimited powers, not subject to any judicial restraint, to take any arbitrary, capricious and oppressive action against any person who is subject to income taxes under the statute necessarily falls by its own weight.

Apart from the fact that it is settled that an assessment which is not made in good faith is a fraudulent assessment having no legal validity, it is inconceivable that Section 7421 of the Internal Revenue Code can constitutionally operate to deprive the courts of jurisdiction to protect citizens by injunction from such illegal and oppressive acts of administrative officers, who are charged with the duty to apply the statutory provisions enacted by the Congress fairly and impartially and solely for the purpose of collecting the legal amount of the liability imposed by the taxing statute.

Although respondent's brief attempts to obscure the facts, it must be remembered that the fact that the jeopardy assessment was not made in good faith, but was a fraudulent assessment deliberately put at a fantastically insupportable figure for the purpose of destroying the petitioner and preventing it from further effectively defending itself against the pending criminal charges and asserted civil liabilities and penalties, does not rest upon mere allegations in petitioner's complaint, but is a fact found

by the District Court which was not challenged in, or disturbed by, the Court of Appeals. The undisputed evidence submitted at the hearing impelled this finding of fact, even though the Government, by asserting a spurious claim of privilege (which was promptly abandoned when the case reached the Court of Appeals), refused to obey the Court's order to produce the admittedly relevant documents.

While respondent now asserts (Br. p. 7) that the refusal to obey the District Court's admittedly valid discovery order for production of these documents was because it was not required to enter into "a dispute about the amount of liability" in the District Court, it is quite plain that this is but a mere inaccurate afterthought. No such position was asserted below; there "Mr. Rita and Mr. McNelis * * * stated and represented that the Attorney General declined to produce any of the said material on the *sole ground* that all of it was governmentally privileged * * *" (App. B., p. 8). The reasonable inference is, and we contend, that production of such documents would have further documented a shocking picture of abuse of administrative power for wholly improper purposes foreign to the collection of any tax liability which might conceivably be imposed by the statute.

The Conflict with Other Circuits.

It is idle for respondent to assert (Br. p. 10) that there is no conflict between the decision of the Court of Appeals in this case and the decisions of other Courts of Appeal cited by petitioner (Pet. p. 21). While respondent claims that such decisions "are all clearly distinguishable on their facts and present no conflict of law," it is obvious that if the decision sought to be reviewed is correct, each of the decisions cited by petitioner would be wrong because in each of them the taxing statute involved was a valid

statute and the taxpayer was a person who could be liable to pay taxes legally imposed by that statute. Thus, the cases to which we have drawn attention are clearly in conflict with the decision sought to be reviewed for it holds that no person within the ambit of the income tax law can state a case for equitable relief no matter how illegally an assessment be made or how illusory his other remedies may be. This case will, unless reviewed, hereafter be cited and relied upon by the Internal Revenue Service for that, we believe, shocking and unconstitutional proposition. It stands squarely for the proposition that in no circumstances can a potential income tax payer obtain equitable relief—the other circuits squarely hold to the contrary as did the first opinion herein.

That the facts involved in other cases are not the same as those presented here is (fortunately for citizens) not surprising. The callous and wanton abuse here shown fortunately is seldom encountered. But any question of fact is, of course, wholly irrelevant to the question as to whether the novel doctrine announced by the Court of Appeals in this case is an erroneous determination of the applicable law based upon the Court's misinterpretation of *Miller* v. *Standard Nut Margarine Co.*, 284 U. S. 498.

The impossibility of reconciling the instant decision with the law of other circuits or with the first decision of the Seventh Circuit herein (242 F. 2d 645, Pet. appendix p. 20 *et seq.*) is pointed up by two recent decisions of the Sixth Circuit holding that Section 7421 (a) of the Internal Revenue Code does not bar full development of the facts in an injunction suit and does not necessarily bar injunction relief. Those cases are *Lassoff, et al.* v. *Gray*, 266 F. 2d 745 (May 14, 1959) and *U. S. Mut'l. Benefit Ass'n.* v. *Welch*, 59-2 USTC Par. 9561 (June 22, 1959). The first involved the Gambling Tax law and the second the Social Security Tax law. In both it was held error for Dis-

trict Courts to have dismissed complaints for injunctions and the cases were remanded because the "restraint [of Section 7421 against injunctions] is not absolute and an exception to its application is recognized in those cases which present extraordinary and exceptional circumstances requiring the interposition of a court of equity," (59-2 USTC at p. 73,385) and "* * * the factual situations in these cases should be fully developed through a hearing in the trial court" (59-2 USTC at p. 73,385). That is language, and those are holdings, equivalent to the initial holding of the original panel of the Seventh Circuit herein that the District Court determine "the facts playing in, on or about the assessment", (Pet. appendix p. 38). The full development of such facts was frustrated by the Government's subsequent refusal to make discovery. The second decision of the Court of Appeals of which we seek review holds in essence that it makes no difference what the facts were because Section 7421 (a) absolutely bars injunctive relief for persons in petitioner's category. The conflict is clear, inescapable and of deep consequence to all taxpayers.

Moreover, if it be thought that a distinction can be created from the fact that in *Miller* the complainant alleged he did not make margarine, or in *Lassoff* that he was not a gambler, or in *U. S. Mut'l. Benefit* that he was not an employer so that the particular tax at the particular time involved could not apply, we point out that such is no distinction because petitioner denies here that it had any additional net income on which a tax was owing. Two things must exist for income tax liability—the person must be a person in the category to whom the tax can apply *and* he must have taxable income.

Respondent further contends that even if the Court of Appeals erred in its determination that it had no jurisdiction over this case for the reasons stated in its opinion, nevertheless certiorari should be denied because there are

no special and extraordinary circumstances presented to bring the case within a recognized head of equity jurisdiction (Br. pp. 8-10). He points out that the jeopardy assessment was not made until after the continual harassment of petitioner's customers by internal revenue agents had forced it to liquidate its business so that it was no longer a going business concern. Since petitioner has never made any contention that the illegal assessment would destroy a going commercial business, this is only a straw man argument. Our argument and the District Court's finding of fact No. 5-12 (Pet. App. p. 13), goes much further—here the taxing power was being used to totally destroy petitioner as an entity, for enforcement of the levy would have rendered petitioner unable even to maintain its corporate existence, much less to engage in the necessary criminal and civil litigation to show that it in fact owed no additional taxes whatsoever.

Respondent claims that if this is true, it is "irrelevant," and states that "It is well established that the theoretical possibility of such a contingency affords no basis for enjoining the enforcement of a jeopardy assessment" (Br. p. 9). None of the three cases cited by respondent in support of the foregoing argument offers any support for the contention:

O'Connor v. *United States* (CA 4, 1953), 203 F. 2d 301, was an appeal from a criminal conviction for tax evasion. The Court held that the mere levying of a valid jeopardy assessment did not necessarily preclude the Government from obtaining an indictment and subsequently prosecuting an income tax evasion case, and further held on the facts that the taxpayer was in no way embarrassed or discommoded in preparing or presenting its defense in the criminal case. *United States* v. *Brodson* (CA 7, 1957), 241 F. 2d 107, held that the mere fact that a jeopardy assessment had been levied was not a sufficient ground

for dismissal of an indictment for income tax evasion. The instant case is wholly civil and the injunction against the assessment in no way interfered with the companion criminal indictment. Obviously neither the *O'Connor* nor *Brodson* case bears any similarity or is in any way relevant to the question here under consideration.

Respondent relies heavily upon *Lloyd* v. *Patterson* (CA 5, 1957), 242 F. 2d 742; where the Court refused to restrain collection of what apparently was admitted to be a valid jeopardy assessment on the ground that, on the record before it, it could not then determine whether the seizure of the taxpayer's assets pursuant to such assessment would result in denying its constitutional rights to a fair hearing in the civil tax case. At the time of the Court's decision, criminal proceedings which were pending when the suit was originally filed had been disposed of by a plea of *nolo contendere* and a nominal fine so as to render moot that part of the taxpayer's original complaint. Obviously the case is not in point because there was no question of fraudulent assessment for an improper purpose there involved. Even if that were not so, the case clearly does not support respondent's contention that the Court of Appeals would have been justified in disregarding the District Court's findings of fact in this case and dismissing petitioner's complaint without affording it the opportunity of a hearing to determine whether the theoretical possibility of a re-determination by the Tax Court would furnish an adequate remedy at law under the special facts and circumstances in this case.

All that the Fifth Circuit decided in *Lloyd* v. *Patterson* was that the record before it was not sufficient to enable it to reach any final determination as to whether the taxpayer's constitutional rights to a fair hearing in the civil case would be adequately preserved in the absence of the requested injunctive relief. In the present case, the

District Court has found as a fact that the seizure of all of petitioner's funds and assets under the illegal assessment would have the effect of preventing it from maintaining its corporate existence and from defending itself and prosecuting an action "to recover the unlawful exaction • • •" (Finding 5-12, Pet. App. p. 13). This finding must stand.

Finally we suggest that an argument that the result reached below could be sustained on grounds other than those announced by the Seventh Circuit, even if correct (which we deny), is no sound reason for denial of certiorari. The decision has gone in the books as one flatly holding that in no event can there be relief—it will be cited throughout the country for *that* proposition. It is binding in the Seventh Circuit and may be relied on in the 1st, 3rd, 10th and District of Columbia Circuits (where the question may be considered open), while contrary law prevails elsewhere. The matter is one of vast importance and should be settled here.

It is respectfully submitted that the writ of certiorari should issue.

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